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AT A OF THE APPELLATE COURT,

Begun and held at Ott on Tuesday, the seventh day of April,  
in the year of our one thousand nine hundred and fourteen,  
within and for the ond District of the State of Illinois:

Present--The Hon. DUAN. CARNES, Presiding Justice.

Hon. DORRÆ DIBELL, Justice.

✓ Hon. CHAR. WHITNEY, Justice.

CHRISTOPH C. DUFFY, clerk.

J. G. MYHKE, Sheriff.

188 I.A. 1

BE IT REMEMBERED, that afterwards, to-wit: on the 31st day  
of July, A. D. 1914, the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:





Gen. No. 5962.

Estate of Christian Wresche,

(Emma Ackman, appellant.)

vs

Appeal from McHenry.

Christian C. Wresche, et al

appellees.

188 I.A. 1

*Whitney J.*

The will of Christian C. Wresche seems to have been admitted to probate in the county court of McHenry County and an appeal taken by two of the heirs to the circuit court where there was a hearing in which the testimony of the subscribing witnesses was introduced. This testimony is a parently technically correct except that there is nothing in the record to show that the paper witnesses were talking about and which they swore they signed and which the testator signed, was the will. ~~It is perfectly obvious that the witnesses were testifying about but the record does not technically show that it was the will.~~ The circuit court probably not observing that fact denied the motion of the appellant heirs to find against the will, and entered judgment finding that it was the will. Appellees filed no briefs. We are asked to reverse without remanding but this we should not do. The case should be reversed and remanded for another trial.

Reversed and remanded.

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STATE OF ILLINOIS, )  
SECOND DISTRICT, ) ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate  
Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this thirty-first  
day of July, in the year of our Lord one thousand nine hun-  
dred and fourteen.

*Clerk of the Appellate Court.*

STATE OF NEW YORK

IN SENATE

JANUARY 1, 1891

REPORT

OF THE

COMMISSIONERS OF THE LAND OFFICE

IN RESPONSE TO A RESOLUTION

PASSED BY THE SENATE

APRIL 1, 1890

ALBANY: J. B. LIPPINCOTT & CO., PRINTERS.

1891.



1724

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the seventh day of April,  
in the year of our Lord one thousand nine hundred and fourteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

✓ Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

188 I.A. 2

BE IT REMEMBERED, that afterwards, to-wit: on the 31st day  
of July, A. D. 1914, the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:



Gen. No. 5963.

The People &c. Appellee

vs

Appeal from DuPage.

Louis Thexton, Appellant.

*Whitely &*

188 I.A. 2

This is a suit prosecuted against Louis Thexton appellant by the people to recover a penalty for the violation of the automobile law, the offense charged being, running at a rate of speed prohibited by statute. Judgment was entered against appellant for \$5.00 penalty from which this appeal was prosecuted.

Appellant insists that the evidence does not show the automobile was running at a speed exceeding 15 or 20 miles an hour in a corporate village, and also insists that a higher rate of speed is not a violation of the law, except under the conditions named in the statute and that there was no proof of those conditions. This question of fact was submitted to the court for determination on conflicting evidence and the opinion there is sufficient evidence in the record to support the finding of the court and sufficient to prohibit us from reversing on that ground. It is insisted it must appear there was a willful violation of the statute before the penalty could be imposed and that "willful" means wicked, intentional and with the intention to do something wrong. This is to recover a statutory penalty for the doing of things prohibited by the statute. The only intention necessary is <sup>to do</sup> ~~the doing of~~ the act prohibited. It is insisted that the people that this case is in correctly a criminal case and that the only way it could be brought to this court was by writ of error. Had the people made motion to dismiss the appeal for this reason at once, our

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doubtedly have prevailed, but it waived this right by joining in the stipulation as to the bill of exceptions in filing briefs in this court. (Ferris v The People 71. Ill. App. 560 and cases there cited.)

Judgment affirmed.

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STATE OF ILLINOIS, 1888. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate  
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, do HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this thirty-first  
day of July, in the year of our Lord one thousand nine hun-  
dred and fourteen.

*Clerk of the Appellate Court.*





220

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April,  
in the year of our Lord one thousand nine hundred and fourteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

✓ Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

103 I.A. 3

183 I.A. 3

BE IT REMEMBERED, that afterwards, to-wit: on the 31st day  
of July, A. D. 1914, the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:

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Gen. No. 5965.

The People ex rel. appellee.

vs

A peal from Co. Ct. Marshall.

John DeWalt, appellant.

*Whitney J.*

188 I.A. 3

John DeWalt, appellant, was convicted of being the father of a bastard child of Emily Jane Ray. This appeal is prosecuted from the judgment entered in that case. Appellant was a man with a family and Emily Jane Ray was his wife's half sister. The only evidence in the case in regard to the alleged intercourse from which the child was conceived was that of Emily Jane Ray and appellant. Emily Jane Ray swore that appellant was the father of the child, and he testified he was not, and that he had never done any of the things leading up to the alleged intercourse. The testimony of Emily Jane Ray is of such an unsatisfactory and contradictory character that it does not produce a favorable impression upon this court. When she testified on the trial resulting in the judgment which is appealed from, it was the fifth time she testified concerning the same facts. There had been two previous trials of this case, the record of which trials are not in the record in this case, but the facts are stated in the briefs and not questioned. She had been a witness twice in a suit for seduction brought by the father against appellant. We might ~~under certain circumstances~~ feel compelled to affirm under this testimony, the case having been submitted to a jury and they having passed upon the questions of fact, but there is sufficient error in one of the instructions given for the people to require a reversal of the judgment on the ground of the giving of that instruction alone. By that instruction the jury were told that the

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most convincing evidence was on the side of the girls.

Evidently something was omitted from this instruction. The jury were also told by this instruction that the law is that the most convincing evidence was on the side of the people without regard to the number of witnesses. The number of witnesses is an element which should always be taken into consideration by the jury. Such an instruction was calculated to mislead the jury and a new trial should be given. Reversed and remanded.

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STATE OF ILLINOIS, )  
SECOND DISTRICT. ) ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate  
Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, do HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this thirty-first  
day of July, in the year of our Lord one thousand nine hun-  
dred and fourteen.

*Clerk of the Appellate Court.*





1227

## AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April,  
in the year of our Lord one thousand nine hundred and fourteen,  
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

188 I.A. 6

BE IT REMEMBERED, that afterwards, to-wit: on the 31st day  
of July, A. D. 1914, the opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, to-wit:

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Gen. No. 5838.

188 I.A. 6

Commissioners of Highways.

vs

Appeal from Whiteside.

Drainage Commissioners.

Per Curiam.

The commissioners of highways of the town of Tampico in Whiteside county filed an amended petition against the Drainage Commissioners of Drainage District No. 2 of Tampico and ~~Hamman~~<sup>Luna</sup> Townships in Whiteside County for a writ of mandamus to compel the Drainage Commissioners to replace a bridge over a drainage ditch where said ditch crosses a certain highway and to levy an assessment therefor if necessary. The respondents filed an answer and pleas. A demurrer was sustained to certain pleas and issues were joined on the answer and the rest of the pleas. A jury was waived, proofs were heard and a mandamus was awarded pursuant to the prayer of the amended petition. This is an appeal by the respondents from said judgment.

At the October Term 1913 we considered this case and decided it by a majority vote. The preparation of the opinion of the majority was assigned to Mr. Presiding Justice Whitney who was one of the majority. He was afterwards taken ill and he died on July 18, 1914. One of the remaining members of the court is of the opinion that the judgment should be affirmed and the other that it should be reversed without remainder. An opinion upon the merits cannot be prepared until after a successor to Judge Whitney has been appointed, which cannot be earlier than October 1914, and until the new member of the court has had time to consider said cause in connection with his other duties. It is apparent to us that every party may be defeated; it will not be satisfied to abide

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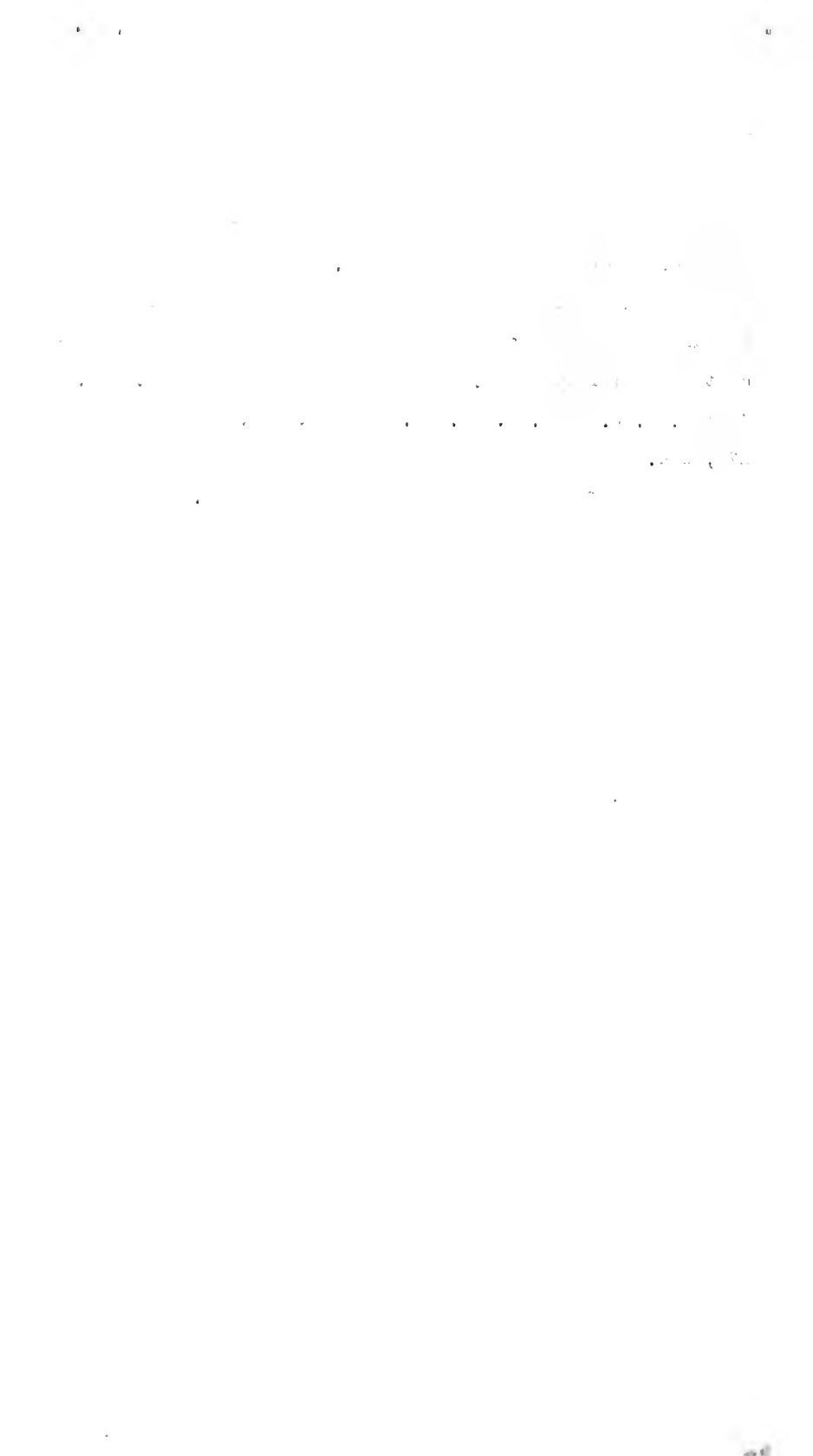
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the judgment of this court but will endeavor to secure a final decision by the Supreme Court. We therefore conclude that the interests of the parties will be best served by avoiding further delay in this court by affirming the judgment by a divided court. *Binder v Langhorst*, 139 Ill. App. 493; *P. C. C. & St. L. Ry. Co.*, 144 Ill. App. 293, no 242 Ill. 178, 184.

The judgment is therefore affirmed.



STATE OF ILLINOIS, )  
SECOND DISTRICT. ) ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate  
Court, in and for said Second District of the State of Illinois, and keeper of the Records  
and Seal thereof, do HEREBY CERTIFY that the foregoing is a true copy of the opinion of the  
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the  
seal of the said Appellate Court, at Ottawa, this thirty-first  
day of July, in the year of our Lord one thousand nine hun-  
dred and fourteen.

*Clerk of the Appellate Court.*





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Filed Dec. 27, 1913-

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*File - 112-11*

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188 I.A. 11

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such city involved than in London. It is not  
 tant to furnish cars suitable for the purpose of the  
 for which they are used. It is obvious that in a not be  
 shipped in cars in such cases. The cars are less suitable  
 in the view of the regard to the way in which they are used  
 cars, but it is not necessary to reconcile this with the fact  
 on that point but on fairly point to the fact that the cars

do not intend to give any further information. This, as provided by the statute, fixes the time at the distance of one day, but the work of the FBI in the investigation of such matters is not limited to the time in which the Bureau is required to act. The Bureau is not required to act within the time limit, but the Bureau is required to act within the time limit.

1. The first item is a letter from the [redacted] of [redacted], dated [redacted], regarding the [redacted] of [redacted] and [redacted] of [redacted]. The letter states that the [redacted] of [redacted] and [redacted] of [redacted] are [redacted] and [redacted] of [redacted] and [redacted] of [redacted]. The letter also states that the [redacted] of [redacted] and [redacted] of [redacted] are [redacted] and [redacted] of [redacted] and [redacted] of [redacted]. The letter is signed by [redacted] and [redacted] of [redacted] and [redacted] of [redacted].

to furnish a ship equipped with main guns and  
engines in the event of a second attack.

... circuit court ...

1913-

C. D. H. yers-

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Filed May 1, 1914-

The People of the Republic of China is  
dependent on error.

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Charles Carter.,  
124th St in front-

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The stated Attorney of Clark and county filed a motion of twenty counts in the county court charging Charles Carter with selling intoxicating liquor in violation of the law in the county while the same was anti-saloon territory. The case was tried before a jury with the defendant was found guilty on the first twelve counts. The motion for a new trial on the ground of judgment was overruled and a judgment imposing a fine and a disbarment was duly entered on said verdict. The defendant has filed out a writ of error to review that judgment.

After the plaintiff in error had entered a bill of particulars, they  
 he entered a motion for a rule on the defendant to file a bill of particu-  
 particulars and in support of the motion filed a writ of habeas corpus.  
 had a complete defense to the case on the merits and that it was im-  
 ble to properly prepare his defense without a bill of particulars.  
 The court overruled the motion and granted the writ of habeas corpus.  
 error on that ruling. The only difference between the various courts  
 is in the date on which the writs were allowed to issue.  
 The date allowed is in many cases a date which is not  
 the date of the offense, but the date of the statute of  
 limitation. A defendant is not entitled to a bill of particulars  
 as a matter of right (People vs. Green, 100 Ill., 111). But  
 when it is necessary for a defendant to prepare his defense  
 prepare his defense without a bill of particulars, the court  
 should be required to file a bill of particulars. (People vs.  
 a bill of particulars is not a matter of course. (People vs.  
 (People vs. 11, 100 Ill., 111; People vs. 10, 100 Ill., 111).



In this case the affidavit stated that the defendant was not guilty and that he could not prepare his defence without a bill of particulars. The law presumes the defendant is innocent before the trial, and he was before entering on the trial, entitled to some information as to the charges against him that he might prepare ~~his~~ his defence.

The record shows that "among other" questions, asked a juror on his preliminary examination, one informed him that the law presumes that the defendant is not guilty up to the time the jury arrives at a verdict and then asked the juror, "Will you do that?" It is insisted that the court erred in sustaining an objection to the question. The question is immaterial as it is the presumption of innocence with which the law clothes or accompanies a defendant until verdict. That is the only question in the record that was asked the juror and the record does not show but that the question had been answered by the juror in reply to other questions, on his examination, hence it does not appear that the ruling was erroneous.

It is insisted that the prosecution did not prove that the town of Champaign was anti-saloon territory. The people introduced in evidence the record kept by the clerk of the Town of Champaign showing that at the township election held in the Spring of 1908, the proposition shall this town become anti-saloon territory was voted upon. The record gives the number of votes cast for and against the proposition and shows that there was a majority of five in favor of the town becoming anti-saloon territory. In 1910, and again in 1912, the question shall the town continue to be anti-saloon territory was voted upon. The record shows the number of votes cast in each precinct on the proposition submitted and that in 1910, there was a majority of 557 votes in favor of the town remaining anti-saloon territory, and that in 1912, there was a majority of 479 votes in favor of the town remaining anti-saloon territory. The returns in the poll books of the different precincts were also offered in evidence and verify the accuracy of the record made by the clerk.





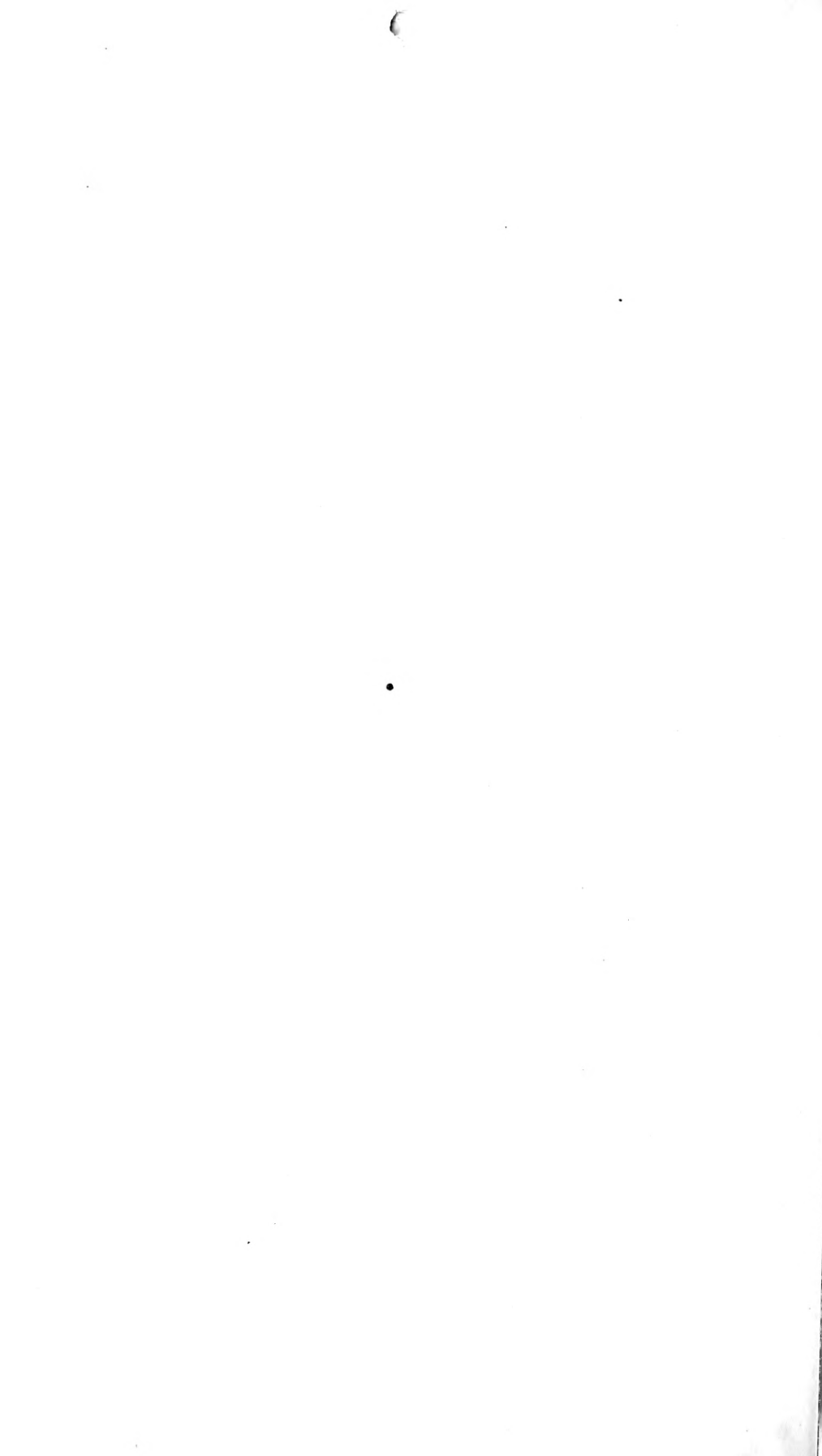
The evidence shows beyond a doubt that the term of "foreign" and "anti-saloon territory" at the time alleged in the information.

Thomas Hagan, a witness who runs a transfer business, who had neither delivered anything to the defendant's place of business nor seen anything delivered there was permitted to testify over objection that his driver had delivered Three Weeks beer to the defendant's place of business. This was <sup>evidence</sup> that his driver told him to deliver. The objection should have been sustained as to him this evidence, since it was hearsay.

The defendant in error introduced proof concerning the acts of the plaintiff in error by two detectives named Armstrong. The older Armstrong testified that he became a detective in May, 1911. The plaintiff in error in cross examination sought to show that the witness had resided in what had been his occupation before he became a detective and he replied that he had been a preacher and gave his place of residence as far back as 1896, the court sustained objection to further cross examination as to where he had lived and what had been his occupation. The cross examination of the witness in that line was a matter ~~not~~ within the reasonable discretion of the court.

A witness named Hill testified that he had only been in Chicago a week before the trial, nothing further being said of him. On cross-examination the witness answered that he had not received money for testifying in the case. He was then asked if he had not been offered \$100. and more for testifying in the case if the defendant was convicted. An objection to the question was sustained. The witness had not testified to anything in the case and there was no error in sustaining the objection.

The defendant is not to testify in ~~his own~~ defense in argument to the jury, counsel for the ~~well~~ + old ~~of~~ jury but ~~that~~ "Carter has a right to prove his innocence if he wants to". This was an indirect reference to the fact that the defendant had the right to testify in his own defense and the conduct on the part of counsel is unprofessional and prejudicial. *Ill. vs. People*, 216 Ill. 509.



Plaintiff in error contends that the court erred in giving the people's ninth and tenth instructions. The ninth is a copy of that part of Section 17 of the Local Option Act, which prescribes the effect of the issuance of an internal revenue special tax stamp. The tenth informs the jury that prima facie evidence is evidence sufficient to establish a fact unless that evidence is rebutted. It is not error to give an instruction in the language of the statute. *Donk Bros. Coal and Coke Co., vs. Peyton*, 192 Ill. 41. The tenth simply tells the jury the meaning and effect of the phrase "prima facie evidence".

The fourteenth and fifteenth instructions given at the request of defendant in error refer to the detectives who had testified in the case and they tell the jury that they should not "be prejudiced to the extent of disbelieving such witnesses solely on account of such facts". These instructions are erroneous and subject to criticism for the reason they are argumentative and refer to and direct the attention of the jury to the evidence of particular witnesses. (*People vs. Whalen*, 111 Ill., 16). The nineteenth instruction given at the request of plaintiff in error refers to the evidence of the detectives and is vicious in that it tells the jury that the evidence of private detectives should be received "with caution". *People vs. Gardt*, 238 Ill. 468; *French vs. French*, 134 Ill., 139; *People vs. Newbold*, 260 Ill., 196.

The court refused to give the following instruction asked by plaintiff in error. "The jury are instructed as follows:-

The jury in a criminal case are, by these statutes of Illinois, made judges of the law and evidence; and under these statutes it is the duty of the jury, after hearing the arguments of counsel and the instructions of the court, to act upon the law and facts, according to their best judgment of such law and such facts."

This instruction states the law in criminal cases as commanded by the Statute Sec. 431 of the Criminal Code. The court might have modified it by adding the judicial limitation that has been given to that section, "if the jury can say upon their oaths that they know the law better than the court". (*Juritch vs. People*, 223 Ill.).



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434.) but- it was error to refuse the instruction. For the errors pointed out the judgment is reversed and the case remanded.  
Reversed and Remanded.

11

Gen. No. 6123.

October Term, 1913-

Ag. No. 28-

Filed May 5, 1914-

E.L.Scott and W.F. Gaumer,  
Appellants.,

VS.

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Appeal from Edgar.

J. Ogden O'Hair.,  
Appellee-

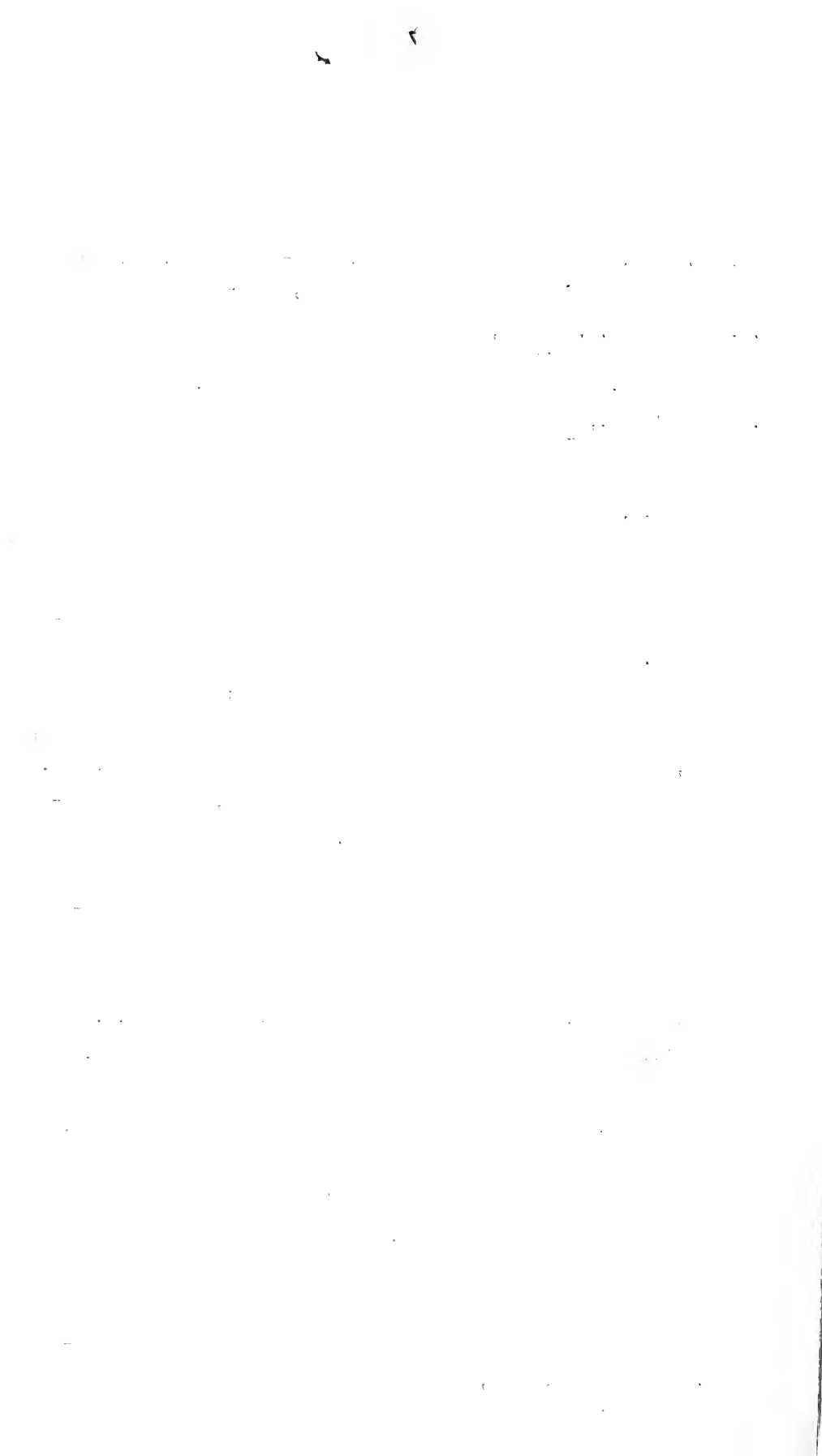
188 I.A. 26

Thompson, P.J.

This is an action in assumpsit ~~xxx~~ begun by plaintiffs against the defendant to recover commissions for services claimed to have been performed for the defendant by plaintiffs as real estate agents. The declaration consists of the common counts with which the plaintiffs filed a bill of particulars:- "To commissions in assisting in the exchange of lands of defendant in Edgar County, Illinois, for the lands in the State of Arkansas, and cash \$2,500". The jury returned a verdict for plaintiffs for \$50. on which judgment was rendered and plaintiffs appeal.

The only question seriously argued on behalf of appellants is that the verdict is contrary to the weight of the evidence

The evidence shows that appellants are real estate agents dealing in lands in Mississippi and Arkansas, with an office in Paris, Illinois. Appellants acted with a Mr. Price, of W.M. Price & Co., who are real estate agents in Stuttgart, Arkansas. The appellee resided on a farm of 381 acres, ten miles south west of Paris, Illinois. In the Spring of 1911, Scott, one of appellants, requested appellee to go to Arkansas to look at lands that appellant had for sale and proposed to pay appellee's railroad fare and other expenses if he would take the trip. Appellee accepted the offer and went to look at the land Scott had for sale but did not buy the land. There were several conversations between the parties after that time in which appellants sought to sell land in the south to appellee. In December, 1912, appellants with one Burton, a brother-in-law of Scott, and who also was a real estate agent with an





office in Urbana, Illinois in Arkansas land, which was the 1-  
lee's residence and solicited to go to Arkansas to see and  
owned by Price & Co. Appellants desire to go, but all of them  
went to Thomas Brazier, who in the neighborhood of Little Rock, was offered  
to pay his expenses if he could go to Arkansas and see the land  
and to go with him. Brazier got a place to go in Little Rock, and a few  
days thereafter Scott went with an automobile to Appellee and Brazier,  
and the three with Burton went to Arkansas and looked at the  
Price lands, which ~~was~~ did not suit Appellee. Price then offered  
Appellee 751 acres of land located on the Green River. Appellee then re-  
turned to Illinois, but when they came back to see the land in  
lee's farm there a contract was made for the purchase of Appellee's  
farm for the Green land and \$24,000 cash.

The evidence tends to show that Appellants were dealing with  
Burton and Price to sell some of Appellee's north eastern lands  
and that they were not working for Appellee. Appellee testifies and  
insists that Appellants were not his agents. There is evidence that  
while in Arkansas, Appellee asked Burton if he would buy land if  
they made a deal, and Burton said no, but he would get his pay from  
Price, and that he would pay Appellants if a commission had to be  
paid. Scott had left Stuttgart, before this and on Appellee's  
return to Illinois, Appellee with Brazier went immediately to Bur-  
ner's house and asked him what he thought if a trade was made whether  
Appellants could expect compensation if further required, "and he an-  
swered me saying to give it to us". This is never denied by  
Burton who says he told him they could charge the customary commis-  
sion. This is denied by Appellee and Brazier. There is evidence that  
Scott refused to pay one Hitchcock, \$500, if he would get Appellee  
and his wife to sign a contract to sell the land and to bring  
out the contract. The evidence also tends very strongly to show  
that in the exchange of land there was no contract at all in-  
deed, Appellants were acting in the interest of the Arkansas parties  
and not of Appellee. If they were acting in the interest of the  
Arkansas parties they must not be entitled to any commission or  
anything to recover from Appellee.

Appellants argue that they are either entitled to a two per  
cent commission on the amount involved or they are not entitled  
to anything.



There is evidence in the case on the part of appellants that the trade for some reason fell through, and after that Scott stated that he was sorry it didn't go through as he was out considerable for expenses and appellee replied that he would pay something on it some day. The jury may have awarded the amount of the verdict for expenses incurred. A new trial for inadequacy of damages will not be allowed on the motion of the prevailing party when, in the judgment of the court, the verdict should have been against him. *Lovett vs. City of Chicago*, 35 Ill. App. 570; *O'Malley vs. Chicago City Ry. Co.*, 30 Ill., App. 309; 29 C.C. 847; *Note to Toledo R. & L. Co., vs. Mason*, 28 L.R.A. (N.S.) 130. If the trial judge had not believed that the appellants were not entitled to recover under the evidence he would have granted a new trial and we cannot say he erred in refusing a new trial.

Appellants state that the court erred in giving the fifth and eighth instructions given at the request of the appellee for the reason there is no evidence in the record on which to base them. These instructions in effect told the jury that if they believed from the evidence that appellants were acting as the agents of the Arkansas parties in procuring an exchange of real estate without disclosing that fact to appellee then appellants were not entitled to recover. The preponderance of the evidence tends to show that appellants primarily were endeavoring to sell Arkansas land to appellee and the trade of appellee's land was only an incident to the sale of the Arkansas land. There was no error in the instructions. Finding no error in the case the judgment is affirmed.

Affirmed-

Mr. Justice Scholfield took no part in the decision in this case.

H. B. Schuchfield

Filed May 5 - 1913

Gen. No. 6131

October Term, 1913.

Ag. 35

John Price, Appellee

vs.

The Clover Leaf Coal Mining  
Company, Appellant,

Appeal from Montgomery

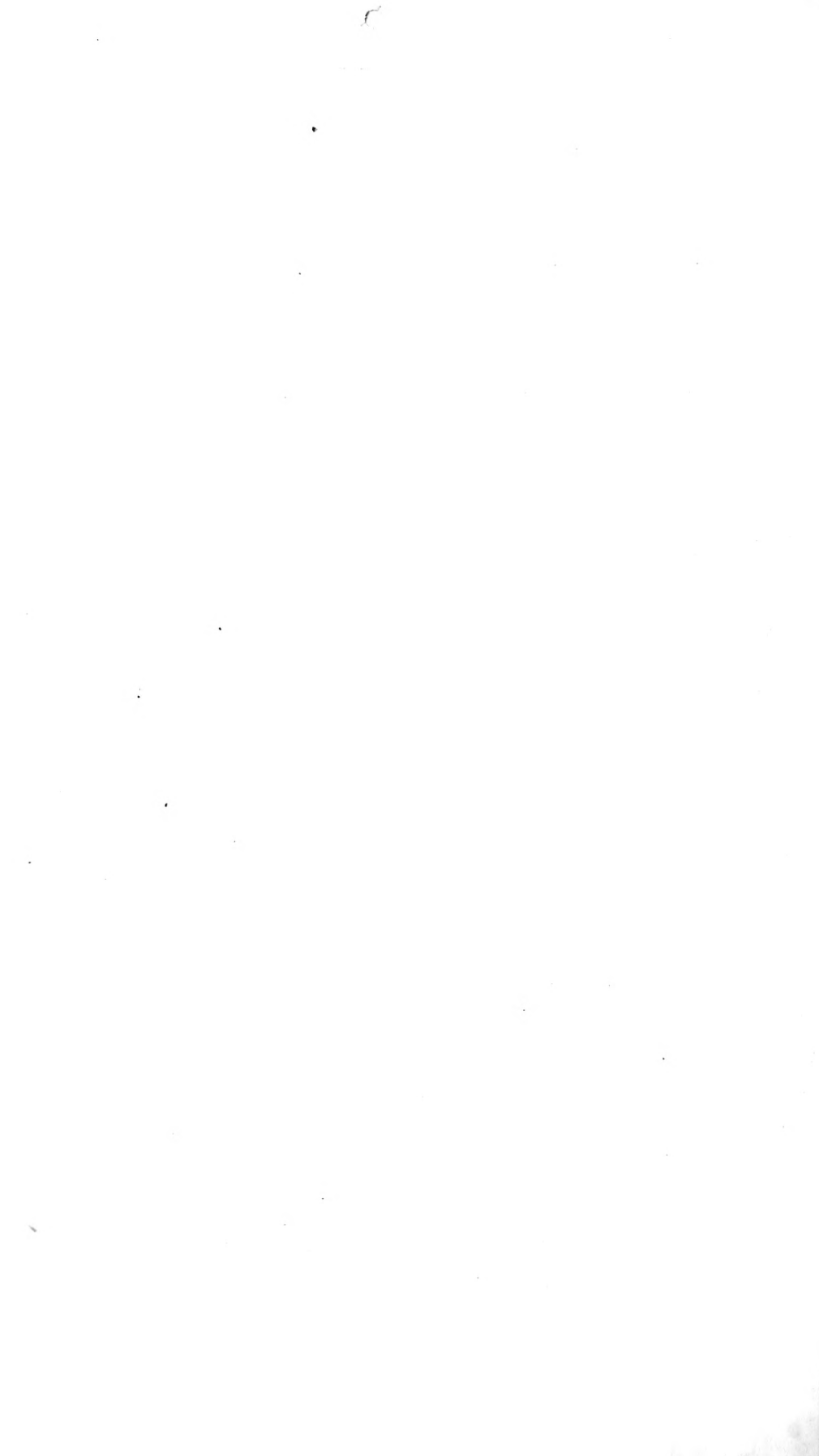
Opinion by Thompson, P. J.

183 I.A. 27

Appellee recovered a judgment of \$1,500 for personal injuries, which he sustained on June 25, 1912, while working as a coal miner in the mine of appellant.

The declaration contains three counts. The first count avers the enactment of the Compensation Act approved June 10, 1911; that the appellant had elected not to provide and pay compensation according to the provisions of said act, and that appellant thereby was deprived of the common law defence of assumed risk, fellow servant and contributory negligence, except that contributory negligence of an employe shall be considered in reduction of damages; that the appellee had elected to accept the provisions of said act which entitled him to recover for the injuries sustained; that while the appellee was engaged as a miner in a certain cross cut between certain rooms, a large piece of slate, which had been hanging in the roof for to-wit a week, the condition of which was or by the exercise of ordinary care would have been known to appellant, without warning fell upon and injured appellee, etc.

The second count contains the further averment that it was the duty of appellant to use reasonable care to furnish the appellee a safe place to work, but that disregarding its duty it negligently caused appellee to work in said cross cut, which was not a reasonably safe place as there was a large, loose and dangerous rock hanging over where appellee passed and was employed the condition of which, by the exercise of due care, was or could have been known to appellant.



The third count avers that appellant was operating a coal mine and in said coal mine was a certain cross cut where appellee was required to pass and work. It pleads the provisions of Section 21, of the Miners Act of 1911, concerning mine examiners and avers that in said cross cut, where appellee was required to work, was a dangerous roof and that the mine examiner wilfully failed to place a conspicuous mark thereat and failed to take up appellee's entrance check, and permitted appellee to enter the mine and to work during regular working hours under said dangerous roof, and while appellee was so employed said dangerous rock fell on him etc. A demurrer which is general and special was overruled after which appellant filed a plea of not guilty.

The appellant moved for a rule on appellee to elect on which count he would rely for a recovery, this motion was overruled. At the close of the evidence appellee requested the court to give instructions directing the jury to find the defendant not guilty on each count. These were refused.

The appellant has assigned for error and contends that the court erred (1) in overruling the demurrer, (2) in refusing to require appellee to elect on which counts he would ask a recovery, (3) in refusing to direct a verdict of not guilty, (4) that the judgment is contrary to the evidence and excessive, and (5) in the giving of certain instructions.

The demurrer for special causes states with other reasons that the Compensation Act is unconstitutional and invalid, and that it is not averred that the appellee gave notice that he had elected to accept the provisions of the Compensation Act.

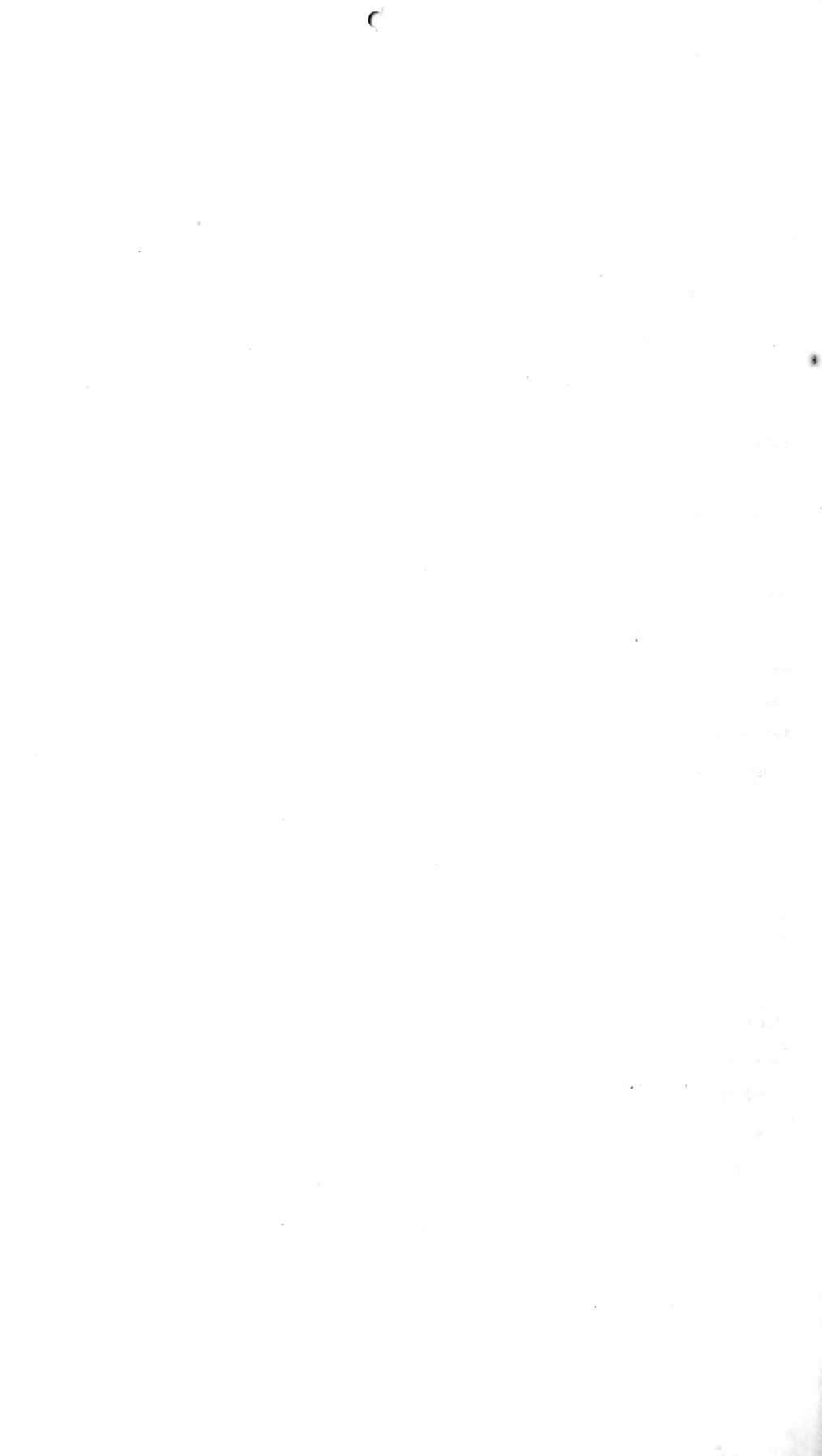
The rule is well settled in this state that where a party to an action desires to have an order of the court overruling a demurrer, reviewed in a higher court he must abide by the demurrer. By pleading over the demurrer is waived. *Heimberger vs. Elliot Switch Co.* 245 Ill. 446; *C. & A. T. Co. vs. Clausen*, 173 Ill. 100, and cases cited. Even if the demurrer





had not been waived by pleading over, the appellate court is without jurisdiction or authority to pass on constitutional questions and the appellant by appealing to this court and submitting the cause on errors assigned, over some of which this court has jurisdiction, has waived all constitutional questions. *Luken vs. L. S. & M. S. Ry. Co.* 248 Ill.377; *P. C. C. & St. L. Ry. Co. vs. Chicago*, 242 Ill.178; *People vs. Maushalter*, 149 Ill.App.399. For the foregoing reasons, the major part of appellants brief and argument should have been addressed to the Supreme Court on an appeal to that court.

Regarding the contention that the court refused to require the appellee to elect on which counts of the declaration he would ask a recovery, neither the motion, the ruling of the court, nor any exception thereto are preserved in the bill of exceptions. Section 81 of the Practice Act provides that a formal exception is not necessary to save for review any question submitted to the court for a ruling thereon during the progress of any trial. This provision of the statute has no application to motions made preliminary to the trial such as motions for a continuance, or the motion in this case to require the appellee to elect; rulings on motions preliminary to a trial, which are not a part of a common law record proper, must be preserved by a bill of exceptions. *C. & E. I. R. R. Co. vs. Goyette*, 133 Ill.21. Appellant contends that there was a misjoinder of cause of action in the several counts of the declaration. If the ruling of the court on the motion to require an election by appellee had been properly preserved for review, still there was no error in the ruling for the reason that all the counts were based on the same state of facts. If appellant is liable to appellee in a suit at law either under Section 21 of the Miners Act or in an action at law as modified by other provisions of the statute, the appellee should not be required to bring separate actions based on the same facts. *Marquette Coal Co. vs. Diele*, 208 Ill. 116.

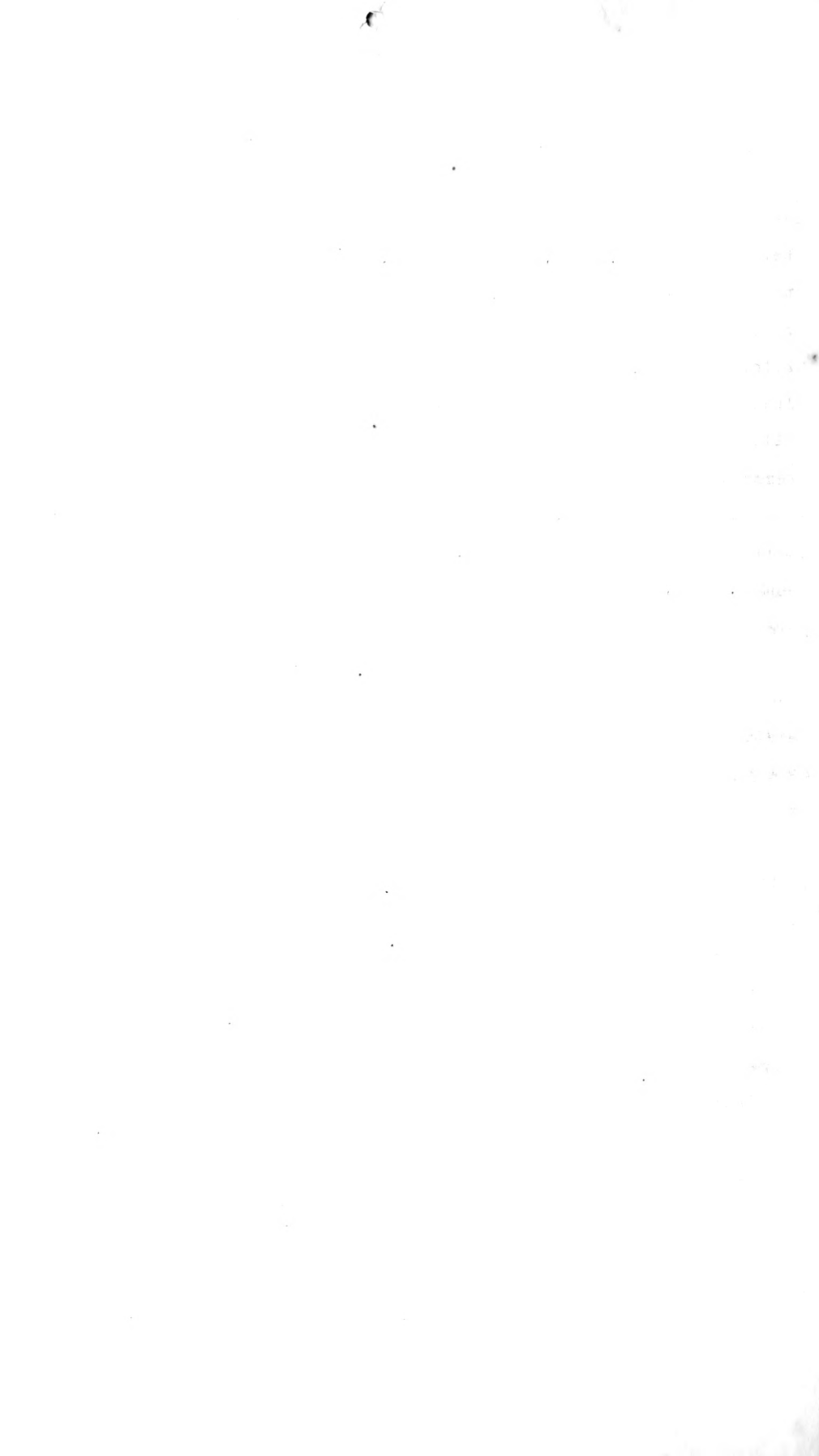


The evidence shows that the appellee was a miner fifty-two years of age working for appellant in a cross cut between two rooms loading coal into pit cars and earning three dollars per day; that on April 25, 1912, while at work, a rock about six feet by twelve and six inches thick, fell from the roof over where appellee was working, striking him and breaking both bones in his right leg below the knee, tearing the ligaments loose on the inner side of the left ankle and injuring his back. Appellee was treated by a physician about two months; the physician's bill for treating him was \$100. Appellee was confined to his bed about two months while under the care of the physician, and to his home about three months; he used crutches until March 1913, and at the time of the trial in April, 1913, was still suffering from the injuries.

The evidence further shows that appellant had declined to accept the provisions of the Compensation Act, and appellee testified that he had neither sent any notice to the Bureau of State Labor Statistics nor given a notice of any kind to his employer that he would not accept the provisions of the act.

The testimony of the mine examiner is that he examined the roof of this cross entry the night before the morning of the accident and found it sound and safe; that he marked with chalk on the roof of the cross entry the time of the examination, and before the men went to work in the morning made a record of his examination of the mine but no record concerning this particular entry in the book kept for that purpose outside the engine house, where the men in passing to work could examine it. There is no evidence tending to show that the appellee sounded and examined the roof of his working place before commencing work the day he was injured, but he testified that before starting to work he saw the chalk mark made by the mine examiner the proceeding night.

It is argued that the court erred in refusing to direct a verdict for the appellant upon each count of the declaration. The first count avers that appellee, an employe of appellant,



in its coal mine was injured in the course of his employment by a rock falling upon him and pleads the Compensation Act of 1911, the provisions of which appellant had refused to accept and thereby had waived the defences of assumed risk, fellow servant and contributory negligence, except that contributory negligence shall be considered in reducing the amount of damages. This count neither avers any duty due from appellant to appellee nor that appellant failed to perform any duty it owed to appellee; it avers neither negligence nor carelessness on the part of appellant. The averment simply is that appellee was injured in the service of appellant by a rock falling upon him. It would have been a good count under the compensation act, if appellant had not elected not to pay compensation as therein provided. The court should have given the peremptory instruction as to the first count.

The second count contains the averments of the first count with the further averment that appellant was negligent in causing appellee to work in said cross cut which was not a reasonably safe place to work, in that there was a dangerous rock which was, or with due care would have been known to appellant.

Under the provisions of the act, if the employer has elected not to accept its provisions and pay the compensation therein provided to an employee who has elected to accept the provisions of the act, then the employer "shall not escape liability for injuries sustained by such employee arising out of and in the course of his employment," because of the common law defences of assumed risk, negligence of a fellow servant or contributory negligence of the employee proximately causing the injury.

The statute also contains a provision that in the event the employer elects to pay compensation as provided in the act--that is has not refused to accept its provisions--then every employee under such employer shall be deemed to have accepted and be bound by its provisions, unless the employee shall file a notice with th



State Bureau of Labor Statistics that he elects not to accept its provisions, in which event the employer shall not be deprived of any of his common law or statutory defences. The provisions of the act are automatically accepted by both parties, by the employer not filing an election declaring his refusal to accept its provisions.

The act does not contain any further provision as to the effect, where the employer has filed an election not to accept its provisions and the employe has accepted its provisions by not filing an election not to accept it.

Section 10 of the act provides that "Any question of law or fact arising in regard to the application of this law shall be determined either by agreement of the parties or by arbitration as herein provided." It then provides that in case of disagreement each party shall elect an arbitrator, and the judge of the county court or other court of competent jurisdiction shall appoint the third, and for the procedure by such board of arbitrators and for an appeal from its decision. It is manifest that if either of the parties has elected not to accept its provisions there can be no arbitration on behalf of a party or against a party who has refused to accept the provisions of the act.

The third section of the act is concerning the employe's right to recover damages and provides that "no common law or statutory right to recover damages for injury or death sustained by any employe while engaged in the line of his duty as such employe other than the compensation herein provided shall be available to any employe who has accepted the provisions of this act." provided if the x injury was caused by the intentional omission of the employer, to comply with statutory safety regulations nothing in this act shall affect the civil liability of the employer. We conclude that the provisions of section three and ten can only apply to cases where both parties have accepted the provisions of the act, and that where the employer has refused to accept its provisions, he thereby waives his defences of assumed risk, fellow



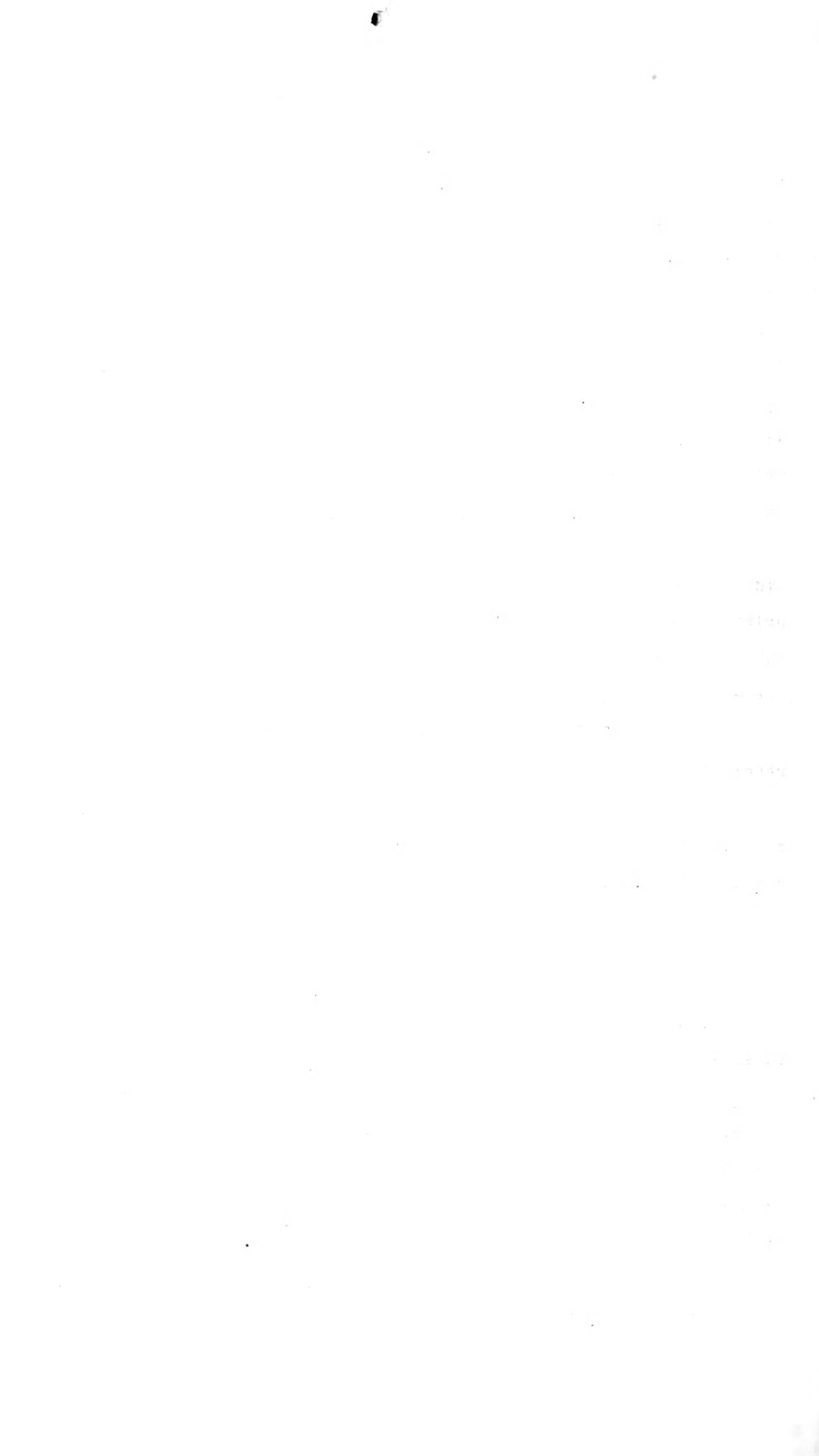


servant and contributory negligence, and that the right to maintain a suit at law remains to an employee, who has not refused to accept its provisions, for any injuries received by him but freed from said defences, if it is averred that the injuries were caused by the negligence of the employer and the evidence sustains the declaration subject only to the provision that contributory negligence shall be considered by the jury in reducing the amount of damages.

The evidence is that the coal had been blasted down several days, and that there had been no shot firing in that part of the mine for three or four days. There was but one mine examiner to examine the entries, roadways, cross cuts, passageways and about sixty rooms. This work he did between nine o'clock in the evening and four-thirty the next morning; the rock fell from the roof injuring appellee about ten o'clock the next morning. The evidence of the examiner showed his method of examination and the extent of it. It was a question for the jury to say from all the evidence and circumstances in evidence whether the examination was of the thorough kind contemplated by the statute or merely perfunctory and whether the roof at that time was safe or was in fact dangerous, *Olson vs. Kelly Coal Co.* 236 Ill.502; *Aetitus vs. Spring Valley Coal Co.* 246 Ill.32. There was evidence tending to prove each count and there was no error in refusing to give the peremptory instructions asked as to the second and third counts.

The first instruction given at the request of appellee, in part is: "If the jury find that the evidence bearing upon the plaintiff's case as alleged in his declaration, or in either count thereof, preponderates in his favor although but slightly, it will be sufficient to warrant the jury in finding issues for the plaintiff."

The second is:—"The Court instructs the jury that Section 1 of 'An Act to promote the general welfare of the people of this state, by providing compensation for accidental injuries or death suffered in the course of employment', approved June 10, 1911, in force May 1, 1912, 'Provides that any employer covered by the



provisions of this act in this state may elect to provide and pay compensation for injuries sustained by any employee arising out of and in the course of the employment according to the provisions of this act, and thereby relieve himself from any liability for the recovery of damages, except as herein provided. If, however, any such employer shall elect not to provide and pay the compensation to any employee who has elected to accept the provisions of this Act, according to the provisions of this Act, he shall not escape liability for injuries sustained by such employee arising out of and in the course of his employment because (1), the employee assumed the risks of the employer's business; (2), the injury or death was caused in whole or in part by the negligence of a fellow servant; (3), the injury or death was proximately caused by the contributory negligence of the employee but such negligence shall be considered by the jury in reducing the amount of damages."

The fourth instruction is a literal quotation of paragraph (b) of Section 21 of the Mines and Miners Act.

It is contended that the giving of the second and fourth instructions was error for the reason no reference is made therein to the evidence, and that there are some portions thereof not applicable to the case.

Neither the second nor fourth instruction directs a verdict or is peremptory in form. It was said in *Donk Bros. Coal & Coke Co. vs. Peton*, 192 Ill.41, where the same objection was made, "The instruction was couched in almost the exact language of the statute and where an instruction is given in the language of the statute, it must be regarded as sufficient because laying down the law in the words of the law itself ought not to be pronounced error." In *Mertens vs Southern Coal Co.* 235 Ill.545, it was said, "The first instruction offered on behalf of appellee sets forth all the duties of the mine examiner specified in Section 18 of the Mines and Miners Act, while the evidence only



showed a violation of certain provisions of said section." The court held the instruction proper and that there was no error in giving it. The first instruction requested by appellee was clearly erroneous, for the reason that the first count was proved by simply showing that appellee was injured in the service of appellant in the course of his employment, irrespective of whether appellant was negligent in any way. All that part of the second instruction preceding the portion that tells the jury the penalties imposed on an employer for refusing to accept the compensation act was misleading in informing the jury that an employee has the right to recover for any injury received in the course of his employment under the compensation act, the giving of the second instruction was reversible error while the first count remained in the case for the consideration of the jury. Concerning the fourth instruction while parts of it had no application to the case, it was not misleading and there was no error in giving it.

The propriety of some other instructions is questioned but we find no reversible error in them, and we do not deem it necessary to discuss them at length.

The judgment is reversed for the errors indicated and the cause remanded.

Reversed and Remanded.

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Gen. No. 6137

October -era 1913.

Page 38

Filed May 5, 1914-

John M. Jones, Appellee, )

vs. )

Appeal from Champaign.

August Winks, Appellant, )

Opinion by Thompson, J.

1881A. 45

A judgment by confession for \$2,755.07 was on November 27, 1912, entered in vacation in the office of the circuit clerk of Champaign county on six judgment notes executed by August Winks. The notes were all payable to John M. Jones and dated May 1, 1912; three of the notes are for the principal sum of \$300 each; two are for \$700 each and one is for \$116.81. At the following January term of court, on motion of defendant the judgment was opened up, and leave given the defendant to plead to the debt. The defendant filed four pleas of failure of consideration which the defendant in his argument states are material to the issues before this court. Upon a trial before a jury, after the defendant had practically closed his evidence, he obtained leave to file two additional pleas. The first additional plea avers a failure of consideration as to all the notes except the sixth which is for the sum of \$116.81. The second additional plea avers a failure of consideration as to \$1,700, the part of the notes which was given for the purchase of a gasoline tractor. At the close of defendant's evidence the court excluded it and instructed the jury to find a verdict in favor of the plaintiff for the full amount of all the notes.

Thereupon an order was entered vacating the order opening up the judgment, and it was further ordered that the original judgment remain in full force. The defendant appeals.

The only questions raised on this appeal concern the sustaining of an objection to certain evidence offered by defendant and the giving of the foregoing instruction. The evidence disclosed that appellee Jones is a local agent of the International Harvester Company at Dewey, in Champaign county. Plaintiff is a tenant farmer living about three miles from Dewey. In March 1912, the agents of





the International Harvester Company, named Newman and Lynch, called upon appellant to sell him a gasoline tractor and plow. Appellant had an Avery 22 horse power steam traction engine and shortly before that time had entered into a contract with another company for a gasoline tractor. The evidence further is that the agents of the Harvester company induced appellant to cancel the contract with the other company and represented to him that the international gasoline tractor was a 45 horse power engine and had the same power as a 28 horse power steam engine; that it used a gallon of gasoline per horse power per day of ten hours; that it would pull eight plows plowing ten inches deep and was better than a steam engine for running a threshing machine. Appellant went to Chicago with Newman to the plant of the Harvester Company and was shown one of the engines. A few days thereafter, Newman acting for the company, a contract was signed at Dewey for the purchase of a tractor and plow. The price of the tractor was \$2,700. In the transaction the Avery traction engine was taken by the Harvester Company at \$1,000 and notes to the amount of \$1,700 were given for the balance on the tractor; the other notes were given for the plow and other things purchased. The order for the machinery directs that it be "consigned to the care of J. M. Jones, agent at Dewey." The tractor was delivered by the vendor to appellant at his farm and the notes were given at Jones place of business where he was shown the contract and was asked by Newman if it was all right to take the notes in his name and upon his replying that it was, they were so taken. Jones never presented or demanded payment of the notes from appellant and before the suit was brought Newman, the representative of the Harvester Company, called upon appellant and demanded payment of the notes. Under such circumstances it would appear that Jones was the trustee for the Harvester Company and having notice of the contract he was not an innocent purchaser.

The contract for the purchase of the tractor is in writing and contains a clause that the appellant purchases the same "subject to all conditions of agreement and warranty printed on the back of this order and made a part hereof". The warranty has several



lengthy and involved conditions attached to it and provides among other things -

"INTERNATIONAL HARVESTER COMPANY OF AMERICA (Incorporated) hereby warrants said thresher, attachments and engine to be well made, of good material, and durable with proper care, and to do good work if properly operated by competent persons, with sufficient power, and the printed rules and directions of the manufacturer intelligently followed. If, after three days' trial by the purchaser said property shall fail to fulfill the warranty, written notice thereof shall at once be given to said company at Harvester building Chicago, Illinois, and also to the agent through whom the same was purchased, stating wherein it fails to fulfill the warranty, and reasonable time shall be allowed said company to send a competent man to remedy the difficulty, the purchaser rendering necessary and friendly assistance. Said company reserves the right to replace any defective parts, and, if then the machinery cannot be made to fulfill the warranty, the part that fails is to be returned by the purchaser, free of charge to the place where received and the company notified thereof, and, at the company's option, another substituted therefor that shall fill the warranty, or the notes and money for such part immediately returned, or the amount credited on the notes that have been given, and no further claim shall be made on said company.

Failure to make such trial, or to give notice as herein provided, shall be <sup>conclusive</sup> evidence of the fulfillment of the warranty, and the company shall be released from all liability;" and "that no representations made by any person as an inducement to give and execute the within order shall bind the company", and "This express warranty excludes all implied warranties \* \* \*".

Appellant contends and by his pleas avers that the agents of the Harvester Company fraudulently and deceitfully made the following untruthful representations to him as an inducement to him to purchase its tractor. (1) That the u-keel and maintenance of the tractor was less than the u-keel and maintenance of a steam engine of like power; (2) that the gasoline tractor would do the



same work a steam tractor would do fully as satisfactorily and at less cost; (3) that the gasoline engine was more easily handled than a steam engine; (4) that the gasoline tractor would operate on a gallon of gasoline per horse power per day of ten hours; (5) that the gasoline tractor would pull eight plows plowing ten inches deep and would also pull a harrow and drag after it, and (6) that the gasoline tractor would operate a sheller and separator as satisfactorily as would a steam traction engine.

The pleas are in the nature of a plea of fraud and deceit in that appellant was induced to execute the contract by false and fraudulent representations as to the nature and value of the tractor but do not aver that the untruthful representations were knowingly made. The pleas were not demurred to and the trial proceeded as if issues were joined on them. In *Allon vs. Hart*, 72 Ill.104, it is said: "But it is not indispensable to the right to rescind, the party guilty of making the misrepresentation knew it to be false, or whether he was ignorant of the fact stated provided it was material, and the other party had a right to rely upon it, did so and was deceived. x x x."

The appellee's contention is that the contract of warranty is in writing and that because it provided that the express warranty excludes all implied warranties, and that no representations made by any person as an inducement to execute the contract shall bind the company and that theretofore the contract having been reduced to writing, no oral evidence could be offered as to what occurred prior to the making of the contract.

The suit is to recover on notes given for the machinery ordered under the contract and not upon the original contract. Under the Negotiable Instrument Act "it is competent to show that the defendant was induced to execute the instrument by false and fraudulent representations, as that is one mode of showing a failure of consideration \* \* \* and for this purpose it may be shown that the consideration expressed in the instrument is not



the real consideration which induced its execution but that it was in fact entirely different. *G. W. Ins. Co. vs. Rees*, 29 Ill. 172. In that case speaking of the statute referred to, and admitting parol evidence to explain the consideration it was said; 'it is impossible that this statute can be made effective in any other way than by receiving such proofs; and in receiving them the old rule that written contracts cannot be varied by parol, becomes, in all such cases ineffective'. *Gage vs. Lewis*, 68 Ill. 64; *White vs. Watkins*, 23 Ill. 482; *Taft vs. Myerscough*, 197 Ill. 600. "If a person makes a distinct assertion of the quality or condition of the article sold, whether it amounts to a warranty or not, which he knows or should know is true with a view to induce another to buy and the other relies on and believes the assertion to be true, and relying thereon purchases, and damages ensue he may maintain an action for deceit." *Ruff vs. Jarrett*, 94 Ill. 475; *Thorne vs. Prentiss*, 83 Ill. 99. The existence of an express written warranty does not exclude a defence based on fraudulent misrepresentations inducing the sale *Gage vs. Lewis*, 'Supra. '; *Taft vs. Myerscough* (supra.); *Mayer vs. Dean*, 115 N. Y. 556; 35 C.Y. 6380. The evidence shows that the Harvester Company is the manufacturer of the tractor and sold the tractor to appellant to be used for certain purposes. The manufacturer of machinery is presumed to know its capacity and adaptability for the purposes for which it is sold. *Iroquois Furnace Co. vs. Wilkins Manuf. Co.* 181 Ill. 562. The plea being failure of consideration by reason of fraud and deceit, parol evidence to show the alleged fraud and deceit was properly admitted and should not have been excluded.

The evidence tends to show that the tractor rated as a 45 horse-power engine, did about the same amount of work as an 18 horse power steam engine, that would use a ton of coal a day costing \$3. per ton, while the gasoline tractor used from 80 to 100 gallons of gasoline costing 15¢ a gallon every ten hours; that it would only pull six plows plowing five inches deep in place of eight plows plowing ten inches deep and that the engine constantly got out of order and had no brake on it. The written contract





warrants the "engine to be well made of good material, and durable with proper care and to do good work if properly operated by competent persons with sufficient power \* \* ". The engine was the power to operate the farming implements. The warranty appears to be very adroitly worded and avoids any mention of the power or its economy in the use of fuel, while the representations made to induce its purchase were that it was a 45 horse power engine; that it only used one gallon of gasoline per horse power for ten hours work and was better than a steam engine to operate a threshing machine.

While the evidence shows that appellant did much work with the tractor between the time it was delivered to him in May, and November when he finally notified Jones <sup>of the company</sup> the agent, that he would not keep it, yet it tends to show that the tractor never worked satisfactorily; that it did not have the power represented by its manufacturer to induce its purchase and that it was ungovernable with a threshing machine for want of a brake. Appellant kept complainin to the agents of the Harvester Company that the tractor was not acceptable and men were sent at several different times by the company to try and fix it, and the evidence introduced by appellant tends to show further that they never succeeded in making it work right or do the work it was represented to do. The last man to try to fix it was Joel Maloney, who was one of the employees of the company that delivered the tractor to appellant and showed him how to run it. He came a ter fair time and took the engine to pieces. He found that it had to have some new parts and did not get it together again for a week, after which it was still unsatisfactory and in the course of three or four days broke down. Appellant then refused to have anything further to do with it and notified Jones that it was at the Company's disposal at the place where it had been delivered to appellant. We are of the opinion that there was



sufficient evidence in support of the additional pleas to require that it be submitted to a jury. If there was fraud in obtaining the contract, then appellant had the right to rescind the contract and return the tractor on the discovery of the fraud, and, if the contract was rightfully rescinded, there was a failure of consideration for the notes to that extent.

Appellant was asked if he believed and relied on the representations concerning the tractor, that he states were made to him by the parties who sold it. The agents were sales agents of the Harvester Company. The Harvester Company cannot by inserting the clause in the contract, that no representation made by any person shall bind the company relieve itself of any false and fraudulent statements, if any there were, made by its agents while in the line of their duty. The rule is that a party may testify whether he believed and relied on the alleged false and fraudulent representations made. *Kearney v. Davis*, 162 Ill.App. 37; *Haldeman vs. Schut*, 109 Ill.App.254.

The judgment is reversed and the cause remanded for the error in giving the peremptory instruction.

Reversed and remanded.

June 11, 1891

Gen. No. 6146-

October term, 1914-

No. 47-

Filed May 5, 1914-

Frank Whisman, Admr.,  
Appellee-

VS.

; Appal from Oregon.

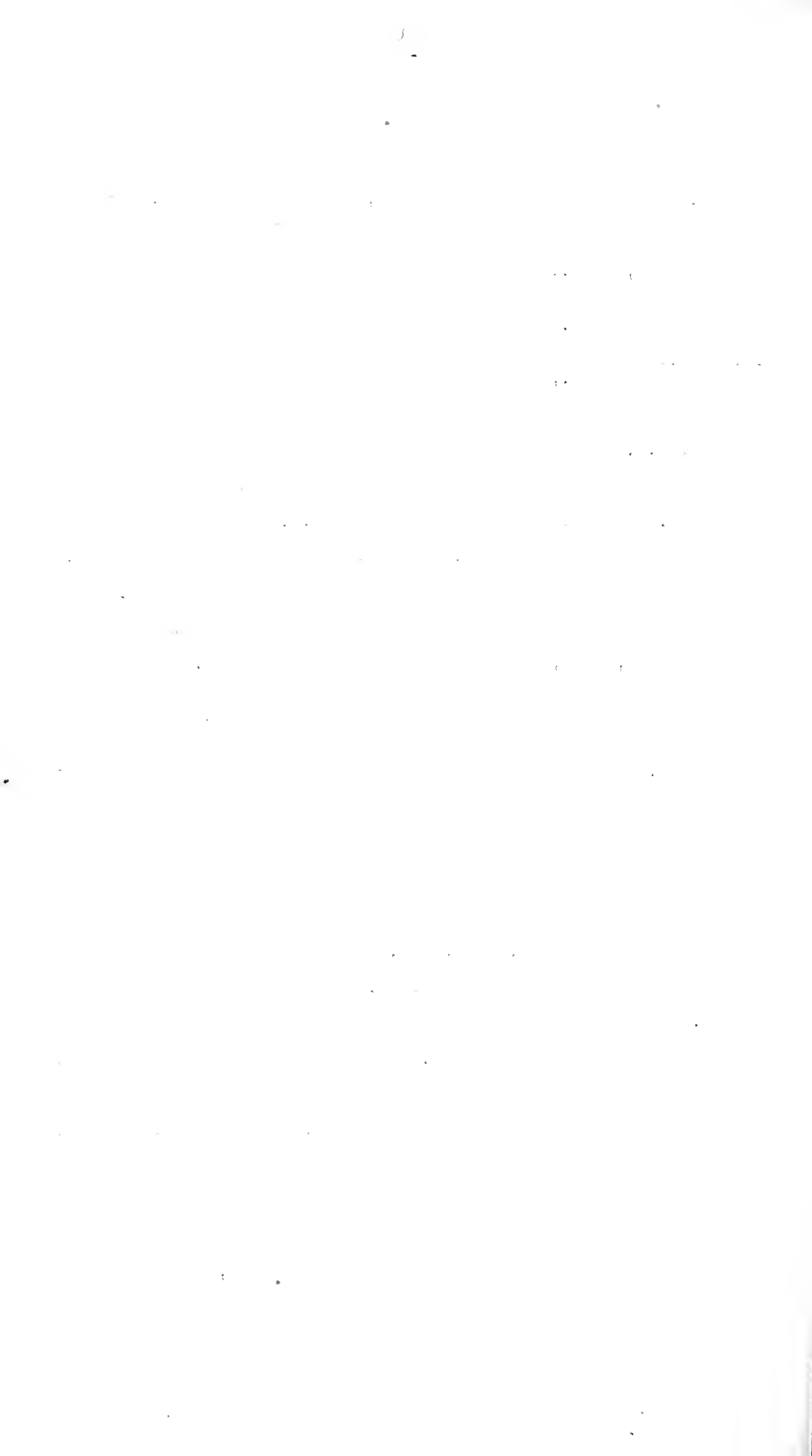
H. I. Small.,  
Appellant.,

188 LA. 61

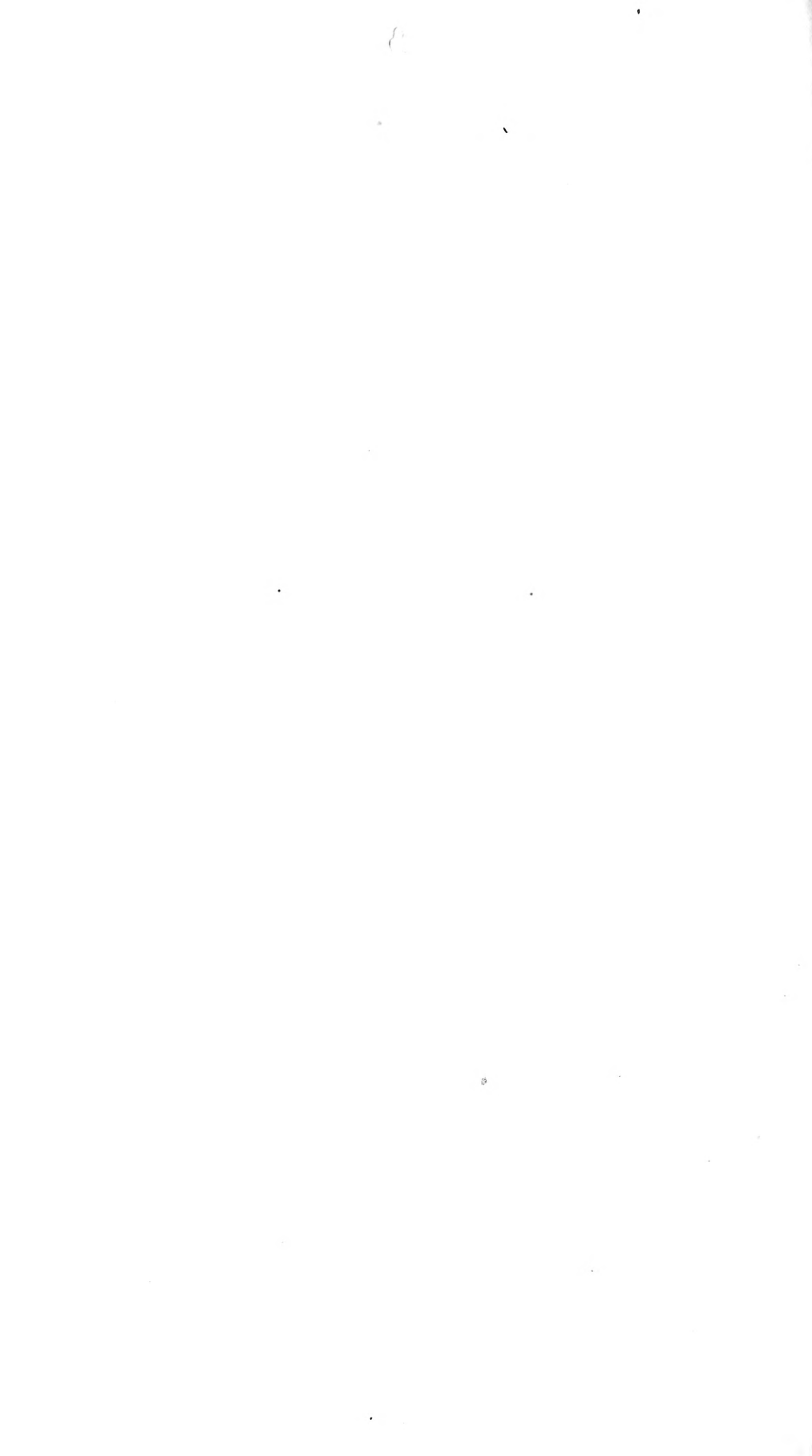
The son, P.J.

This is a suit brought by Frank Whisman, Administrator of Laura B. Whisman, deceased, against H. I. Small to recover damages for the death of Laura B. Whisman, the wife of Frank Whisman, averred to have been caused by malpractice of the defendant. The first count of the declaration avers that the defendant, a physician, on February 15, 1914, was called to attend Laura B. Whisman in her confinement and negligently infected the deceased at the time of the delivery of a child with erysipelas and thereby caused the death of the patient. The second count avers that the defendant failed to exercise the degree of care commensurate with the standard of medical skill in the vicinity of Leroy, the residence of the deceased and did not make as many professional visits as the seriousness of the case required, and wilfully abandoned and refused to give further treatment on February 21, 1914, etc. A trial resulted in a verdict and judgment for plaintiff for \$2,500., from which the defendant appeals.

The evidence shows that Mrs. Whisman was delivered of a child, at a farm house three and one half miles from Leroy, <sup>on the morning</sup> of February 15th, or early of Sunday the 16th, and that Mrs. Clara C. Buckles was the nurse who attended her and who called the physician to attend the patient. The court sustained an objection to a plaintiff testifying to a conversation between the physician and the nurse when the physician first arrived at the house, and to an adjoining room to that occupied by the patient in which conversation been heard by the patient, and to a conversation between the physician and the patient the second day after the call was heard and in which Mrs. Buckles took part and concerning which Mrs. Buckles had testified.









a conversation of such adverse effect upon her before her death in the presence of the deceased in which it testified to be a disinterested witness not in want of the deceased.

Mrs. Buckles testified that during her business was waiting on women in child birth and that she went to Mrs. Whisman's Saturday evening about six o'clock; that Mrs. Whisman was about full, but commenced to have labor pains about nine o'clock, and that she, Mrs. Buckles, called the physician and said "I think we are going to need you out here. I thought I could call on you if you are in town", - and I said, later on I will let you know how about half past ten she again called appellant and said Mrs. Whisman was sick and wanted him to come". Mrs. Buckles was an agent of the deceased in calling the physician to attend Mrs. Whisman. After the physicians arrived the question arose as to was he nurse an agent or simply an employee. It is difficult to define the distinction between principal and agent and master and servant. An agent has been said to be employed in a capacity superior to a servant and is clothed with greater discretion while a servant is bound to perform the service in the manner commanded by the master. (31 CVC. 1192). The record in this case disclosed that Mrs. Buckles was authorized to call a physician but beyond that Mrs. Buckles was a nurse and performed her duties under the direction of her employer and the attending physician. The court had to pass on the question of whether she was an employee only, or whether her employment was in the nature of an employment for service and agency combined on the evidence before it. We conclude that there was no error in the ruling of the court.

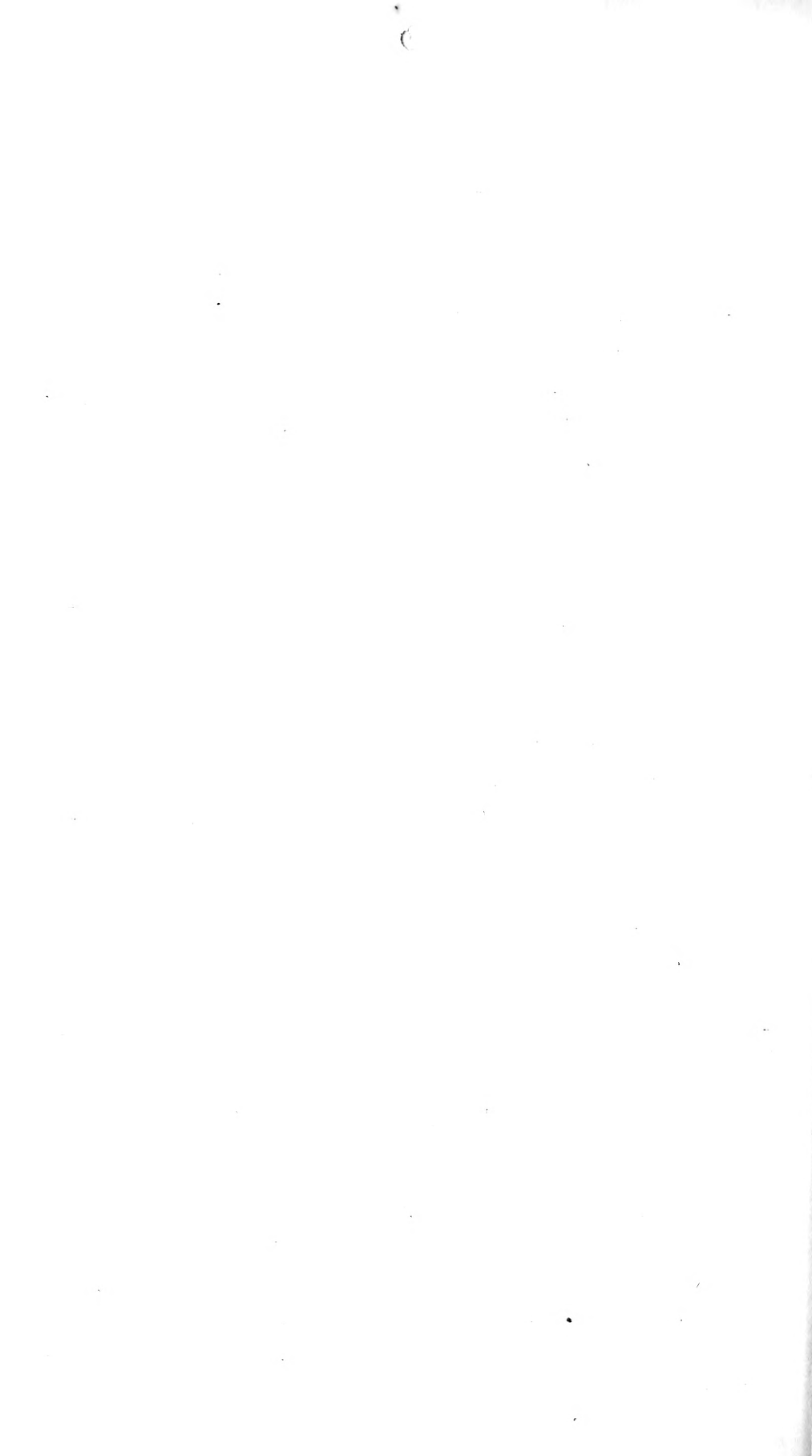
The patient appears to have been taken with severe pain about midnight Sunday. The appellant visited her on Monday and talked with the nurse about the condition of the patient on Tuesday, and visited her about noon Wednesday. The nurse testified that the patient was very sick Thursday morning and that she tried to call the appellant over the telephone that morning but the eight o'clock train had gone to Bloomington, and that she did not call her appellant had come to Bloomington on Monday and back to



6 o'clock that evening that "Mr. [redacted] train" came in and called for appellant, and appellant's wife answered the phone and said he ~~would~~ did not come in on the 6 o'clock train because he would not be in until then. "I said whatever you do tell him to call Mrs. Buckles at Whisman's, I want to talk to him"., and that appellant did not call her. Appellee testified that he called appellant about six Friday morning and wanted him to come out but he said he had to go to Bloomington at night, and that he would have some medicine that appellee should go and get and that he went and got it; but appellant called him over the telephone about 3 or 4 o'clock Friday afternoon and enquired how the patient was and appellee said her temperature was not quite so high, and appellant said he was busy then and asked appellee to let him know later on how she was; that about 6 or 7 o'clock he again called appellant and asked him if he intended coming out, and that appellant said no; that appellee told appellant the patient's temperature was over 102, and appellant said that is not much fever and it was not necessary to come out and appellee told appellant "if you won't come or can count yourself out, we are going to have a doctor and he said all right in hanging up".

The appellant testified to substantially the same conversation on Friday morning but with the addition that he said to appellee that he would come out immediately after the train came in at 1-10 and if caller wanted him, to telephone his wife. Appellant testified that he was not called by any person during Thursday, and that in the conversation at 4 o'clock Friday, appellee told him it was not necessary for him to come out. Appellant was asked if he learned from any one after his return on the 1-10 train Friday that they had called him and an objection was sustained to that question.

Mrs. Minnie Small, the wife of appellant, was asked concerning the conversations over the telephone with Mrs. Buckles and an objection was sustained to her testifying on that ground as to the wife of appellant.



After the court had sustained an objection to Mrs. Small testifying, appellant made a motion to exclude the evidence of Mrs. Pickles as to the conversation with his wife. The court overruled the motion.

The only ground on which the testimony of Mrs. Pickles concerning the conversation with Mrs. Small was competent was on the theory that Mrs. Small was the agent of her husband. There is no evidence in the record that Mrs. Small was the agent of her husband unless such agency may be presumed from her answering the telephone, and the evidence of appellant that upon Friday he told appellee "if he phoned him to telephone his wife". The record does not show whether the telephone was at the residence of appellant or at his office. That a physician may have a telephone in his residence does not of itself make the members of his family, who may answer a telephone call an agent of the physician. Unless the person answering the telephone was the agent of the physician xxx xxxxxxxx the evidence concerning this conversation was incompetent. We do not find any evidence in the record that Mrs. Small was the agent of her husband on Thursday when Mrs. Pickles says she talked to her on the telephone and it was error to overrule the motion to exclude the evidence of the nurse as to conversations with Mrs. Small. This evidence was very prejudicial in view of the record against the defendant.

Section 5 of the Evidence Act provides: "In all cases of transactions where the transaction was had or conducted by such married woman as the agent of her husband, in all cases as the husband and wife may testify for or against each other, in the same manner as other parties may under the provisions of this act", provided nothing in this act shall be construed to permit any husband or wife to testify to any declaration or conversations of the other except in suits between them. Under this provision of the statute, if it was competent for Mrs. Pickles to testify as to the conversation had with Mrs. Small, then Mrs. Small was competent witness to testify to the same conversation. *McCoid vs. West*, 22 Ill. App. 482.

The judgment is reversed and the cause remanded.  
 Reversed and Remanded-

Q. 8-21-48-9

Gen. No. 6158.

October Term, 1913-

Agenda No. 56-

Paul O. Moratan  
Appellee

Filed May 5, 1914-

VS.

;

Appeal from County Court of McLean

Maurice C. McCarthy,  
Appellant

188 I.A. 69

Thompson, P.J.

Plaintiff began this suit before a justice of the peace to recover the amount due on an order for \$77.67 given him by the defendant on a settlement of a building account. An appeal was taken to the county court. At the April term, 1913, of that court, one of the attorneys for defendant being absent from Bloomington, by agreement of counsel in open court a trial by jury was waived, and it was agreed that the case should be tried at that term upon the return of the absent attorney. No trial was had that term. A week before the August term, the judge of the court had counsel called to the court room to set a trial docket for the approaching term, and the trial of this case was set for the third day of the term. On the day it was set for trial one of the attorneys for the defendant made a motion for a continuance, and filed in support of the motion an affidavit made by the attorney and the defendant ~~xx~~ that they had not had notice of the setting of the case for trial and that the defendant could not be ready for trial by 1-30 of that day because he did not know of the whereabouts of two witnesses, who were in the City of Bloomington, and because another witness was in Taylorville, and stating what the defendant expected to prove by said witnesses. The Court denied the ~~motion~~ motion for a continuance and offered to postpone the trial to 1-30 the next ~~xxx~~ day, but counsel stated he could not be ready by that time; the court ~~did postpone~~ did postpone the trial to the following day. The next day counsel for defendant failing to appear the case was tried by jury and a verdict returned in favor of plaintiff for \$82.90 on which judgment was rendered.





Counsel for the defendant have failed to file a motion for judgment notwithstanding the verdict. It is therefore the duty of the court to grant judgment notwithstanding the verdict. It is shown that the defendant was not present at the trial. No reason is shown for the failure of the defendant to appear at the trial. The defendant had used any diligence to prepare for the trial. The defendant is affirmed.

IT IS ORDERED.

H-4-11cc 6.8-

Gen. No. 6169.

October Term, 1913-

App. No. 27-

Filed May 5, 1914-

The People of the State of Illinois,  
ex rel. Stella Cheney.,  
Appellee,

VS.

; Appeal from County Court of

Otis Preston,  
Appellant-

De Witt-

188 I.A. 93

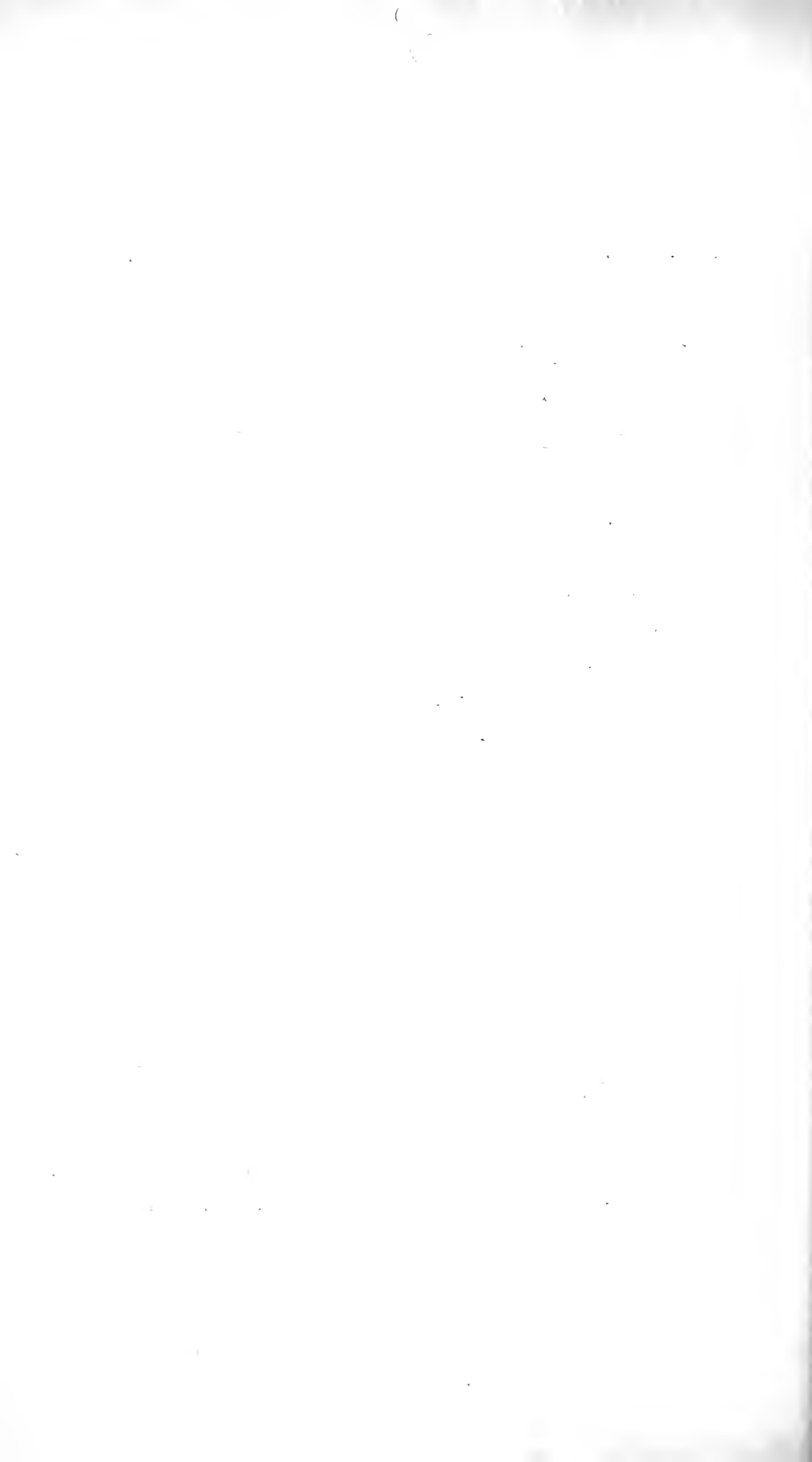
Thompson, P.J.

The relatrix, Stella Cheney, an unmarried woman, on the end of July, 1912, made a complaint in bastardy before justice of the peace, that she was pregnant and that Otis Parker was the father of the child. The defendant was found to be the father of the bastard child of the relatrix. Judgment was entered on the verdict and the defendant appeals.

The evidence in this case is very conflicting and as the case must be reversed for errors of law we refrain from expressing any opinion on the weight of the evidence or the merits of the case.

It is insisted that the court erred in sustaining an objection to evidence offered to show the relations of the relatrix to other men. It was competent for the defendant to introduce evidence to show that the relatrix had intercourse with other men about the time she became pregnant, but the evidence must be limited to a period of time within which, in the course of nature, the child could have been begotten and the relatrix may on cross examination be asked whether she had intercourse with other men within such time. 2 Moys. & W. 248; Alcorn vs. People, 79 Ill. 409; Abbott vs. People, 72 Ill. 416. The child was born July 24, 1912. The evidence shows that the period of gestation varied from 240 to 300 days and that the child was born 16 days before the term period had elapsed. The evidence offered related to acts of the relatrix in January. The objection was properly sustained.

In the cross examination of the relatrix she was asked if



she had not testified to certain things at the preliminary examination before the justice, and on re-examination counsel for the people was permitted to ask her, over objection made, if she had not testified to other things before the justice that were not connected with the questions asked on the cross examination. The evidence on the re-examination should have been confined to such answers, if any, as were connected with and modified or explained the answers inquired about in the cross examination; it was not proper for her to testify concerning her evidence before the justice as original evidence on the trial in the county court.

The evidence shows that the relatrix had in April, 1908, procured a divorce under the name of Estella Tucker. The defendant requested an instruction that if the jury believed the correct name of the relatrix was Estella Tucker they should find the defendant not guilty. The court refused the instruction and the defendant contends that this was error. The evidence shows that the relatrix went, - and was known under the name of Stella Stanley. He made the complaint ~~in the name by which she was known~~ in the name by which she was known, the proof corresponded with the complaint and there was no error in refusing the instruction.

The appellant in several instructions requested the court to inform the jury that it was incumbent on the prosecution to prove the appellant guilty by a clear preponderance of the evidence before they could find him guilty. The court modified the instructions by striking out the word clear. A prosecution for bastardy is a civil proceeding and a preponderance of the evidence was all that is required to authorize a verdict of guilty.

In instructions 1 and 2 the request of the people the jury were informed that a judgment of conviction, only meant that the defendant would be compelled to pay the mother of the child \$100. for the first year and fifty dollars for each succeeding year, if the child lived that long. The jury has nothing to do with the result of the verdict and the instructions as to the effect of



a verdict of guilty were argued, we have seen that no  
have been given. See *Moore vs. Welch*, 13 Ill. 35, 1841.

In the final argument of the case, the defendant  
said among other things:- "My wife, in her weakness  
and ill being; has told me that I had committed the  
perjury herself. For it is not fit to say that I committed it."  
"I don't believe that she could say such a thing," in which  
words she recognized him, and said that she had a cure for  
"Gentlemen of the jury, I am not a man of much  
as this man debauched his woman, and she has told me to  
upon that question, I could not help but say that I would  
kill him". Objections were made to this statement but  
the court made no ruling thereon. The statement was held to be  
inflammatory and prejudicial. It was held that it was  
to tell the jury that the defendant had committed perjury was  
that a court would be unnecessary in such cases, if the  
member of his family had been a witness in the case. In  
the jury to record their duty fully and fairly, and to  
whether justified or not to believe in the truth of the  
an officer of the court, should not be permitted to  
appeals to the passions and prejudices of the jury, and  
evidence is as conflicting as in the case of the defendant  
obtained by such inflammatory statements. See  
*State vs. Proctor*, 26 Ill. 69. The court held that the  
requires the reversal of the case. If the jury had  
cause reversed.

Reversed.

Brook-Hill Co. -



Gen. No. 6181.

October Term, 1914.

Volume 6, 8-

Filed May 5, 1914-

Frank H. Lemon,  
Surviving Partner, etc.,  
Defendant in Error,

VS. ;

Richard A. Snell.

Richard Snell,  
Plaintiff in Error.

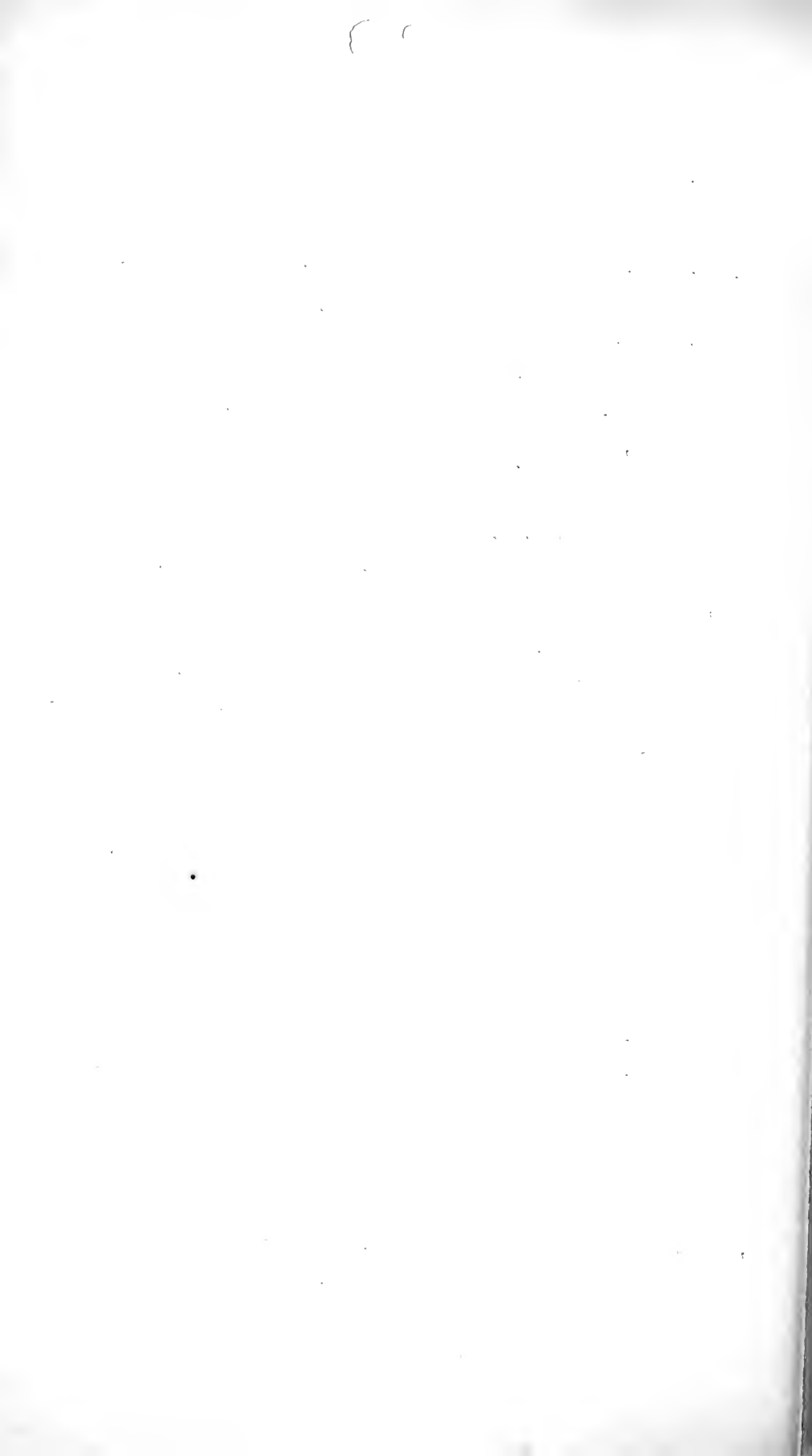
188 L.A. 101

Opinion by Thompson, R. J.

This suit was begun by Richard A. Snell and Frank H. Lemon, partners, to recover attorneys' fees from Richard Snell for services performed by plaintiffs in litigation concerning the estate of Thomas Snell deceased. After the suit was begun Richard A. Lemon, and the suit was prosecuted in name of Frank H. Lemon, surviving partner.

The claim of plaintiff is for \$15,000. For services rendered in the contest of the will of Thomas Snell, in which suit plaintiffs were attorneys for Richard Snell contestant, and for \$5,000. For services rendered in the estate of Thomas Snell and administrator after the suit to contest the will was terminated. A jury returned a verdict in favor of plaintiff for \$1,750 on which judgment was rendered and the defendant prosecutes this writ of error to review the judgment.

Frank H. Lemon was called as a witness in this case. The defendant was permitted to ask the witness some preliminary questions for the purpose of laying a foundation for an objection to any evidence being heard by the jury concerning the will contest. At this preliminary examination it was developed that plaintiffs on October 8, 1910, signed a receipt for \$4,000. in full of attorneys' fees in the case of Snell vs. Lemon and others. The defendant then objected to any evidence concerning the services rendered, or the value thereof, in that suit. The plaintiff was permitted to show that there were three trials of that case in the circuit court,



each of which extended over from two to three weeks, and two appeals to the Supreme Court. The witness testified that the value of the services rendered by plaintiffs ~~in~~ in the litigation was ~~\$24~~ \$25,000. He also testified that he had an express contract with the defendant for the payment of \$7,500 at the ~~successful~~ successful conclusion of that litigation or \$1,000 at the end of it, if it was unsuccessful; that the contest ended in favor of Richard Nell, and that \$3,500 had been paid to them before December 8, and that the receipt for the \$4,000 was for the payment of the balance of the \$7,500. Plaintiff was also permitted to prove over defendant's objection, by a number of attorneys that the value of such services was from \$15,000. to \$20,000. The objection to the evidence concerning the will contest and the value of such services should have been sustained for the reason the services were rendered under an express contract and there was no liability thereunder for the reason it had been fully paid by defendant.

Plaintiff was also permitted to prove, over objection, that after the payment of the \$7,500. they had made a claim for further compensation for services in that litigation and that defendant had made an offer to give them \$1,500. This was an offer to make a donation. It was a promise to give a gift and there was no consideration for it; it was accepted on the part of defendant to satisfy the plaintiffs and buy his peace. The court afterwards excluded all evidence concerning the will contest, the services rendered therein, the claim for further compensation and the offer to give \$1,500; and gave a written instruction directing the jury to disregard all the evidence concerning the same.

After the will contest was disposed of by the attorneys, Lomon & Lomon, W.F. Sweeney and the witness filed a petition in the county court for the revocation of the letters testamentary thereto and issued to Lincoln W. Veldon and for the appointment of petitioner as administrator. An order was entered revoking the letters testamentary and ordering letters of administration to Richard Nell,

( 5

which were issued to him. On the 1st day of the month of March, 1936, of the county court, an order was entered, that upon turn over to the administrator all the assets of the estate in which he was such executor. As soon as the term of court at which the order was entered had expired, notice of the order was served upon Weldon. On April 5, Weldon filed a report of his account as executor and made a motion to vacate the order on him to turn over all the assets in his hands to the administrator. The county court denied the motion to vacate the order on the executor to turn over ~~in~~ all the assets to the administrator, and on motion of the administrator struck the report of ~~Weldon~~ Weldon from the files.

Weldon, the executor thereupon took three appeals from the order of the county court, (1) an appeal from the order directing him to turn over the assets to the administrator; (2) an appeal from the order denying the motion to vacate said order, and (3) an appeal from the order ~~striking~~ striking the report from the files.

On the hearing of these appeals in the circuit court, the court held that the order directing the executor to turn over the assets to the administrator was erroneous; that the county court should have received the ~~report~~ report of the executor ~~and~~ and acted on it. The circuit court did not make a final order in the matter but remanded it to the county court. The court also overruled a motion made by the administrator to dismiss the appeal of the executor from the order directing him to turn over the assets to the administrator and entered an order vacating that portion of his order referring to him to turn over the assets to the administrator and that said order be remanded to the county court. From these judgments in the circuit court, Shell as administrator prosecuted appeals to the Appellate Court where all three of the appeals were reversed, *Shell, Adm. vs. Weldon*, 162 Ill., App. 11, 15, and 17.

Appellant does not contend that the same were not allowed to a judgment against him, but insists that the judgment is reversible and that the excessive amount of the judgment was caused by evidence erroneously permitted to be heard by the jury and argues that the erroneous admission of this evidence was not cured by its subsequent exclusion.



Frank H. Lemon, John Miller, W. J. Williams, L. J. Stone, and Robert P. Vail, practicing attorneys, all testified that they knew the value of legal services and that such services as were rendered by plaintiffs in the matter of the administration were reasonably worth from \$2,000. to \$2,500.

The defendant only called one witness, George H. Ingham, who testified that the services of plaintiffs in the administration were worth \$1,000.00. A review of all the evidence shows that the verdict and judgment are not erroneous, and the clear preponderance of the evidence would have justified a larger judgment for the services for which plaintiffs were entitled to recover. The amount involved was large and the questions in issue were vigorously contested at every step. It is clear that the jury were not influenced by the evidence heard by them and afterwards excluded from their consideration. Since a jury could not reasonably, on a consideration of the proper evidence, have returned a verdict for a less amount than the present judgment the defendant has no just cause of complaint and the judgment is therefore affirmed.

AFFIRMED.

M. H. Lockman -



21. No. 6020.

1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 84

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11-11-11

U.S. Navy - Pacific  
Hawaii - Pearl Harbor

INDEX, J.

188 I.A. 121

This is in relation to the fact that the defendant  
failed to recover damages for the death of his son,  
about eight months after the death, and the fact that  
noon of Sept. 10, 1911, the defendant was on the  
ant's train, his wife in the same train, and the  
passengers. In this case the jury found that the  
on the verdict of the jury is that the defendant is  
which judgment is not now on the record.

The two main concepts of the ...  
 ... of ... on ...  
 ... covers ...  
 ... for ... safety ... the ...

The first error ~~which~~ <sup>which</sup> is insufficient to sustain the verdict or variance between its two versions. The contention is that, but light on the matter, the line, she was there and the agency of which he is the father should have been at the father was also present of the injury. The criticism from does not state cited to sustain the failed to answer any. ble for several reasons. was riding with



trial, and are simply evidentiary facts which must be determined by the jury. Also, if, as a matter of law, the contributory negligence of the father, if any, should be imputed to deceased, then the mother would become her negligence, and is sufficiently negatived by the finding of due care and caution on her part, and such a verdict would be necessarily highly due care and caution on the part of the father. *Elans v. Conrad*, 115 Iowa 183. The declaration is sufficient to sustain the verdict under the evidence, and the verdict does not constitute a variance therefrom.

The case of *Passwaters*, 144 Ark. 610, 21 S.W.2d 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.



Appellant is one of the many who first, according to such instructions on behalf of appellee, and then, and still, required the exercise of due care on the part of the father, and not require it on the part of the child. The instructions as offered by appellee in the first instance required the exercise of due care on the part of the child, but the Court, in its wisdom, by eliminating the question of due care on the part of the child, and substituting therefor the duty of the father to exercise due care. This was done evidently to conform to appellant's theory of the case. The evidence showing no negligence on behalf of the child, it was much to the advantage of appellant to maintain that the child did not use due care, or that such want of care or contributory negligence on his part, should be imputed to the child. Appellant's theory of appellant's contention in trial, was positively shown by its objections to the admission of evidence, its written claims to exclude the evidence and its verdict and its instructions. At appellant's request the court gave a charge in the form, and of words which confine the issue to the due care of the father, and on of them presenting the issue of the care of the child.

Our instructions were asked by and given in accordance with the instructions the jury in substance that if the father is found not guilty if he believed that the child was injured by the failure to exercise due care, or the inability of the father to prevent the injury. As stated before, appellant asked no instruction requiring the exercise of due care on the part of the child. Appellant having induced the court to adopt such a theory, and having made it available to itself, cannot now insist that the court should have adopted some other theory, nor can it complain that the court followed appellee's instructions to conform to the theory of the case presented by appellant's own instructions. However, there was no error in the giving of the father's duty to exercise due care, and it was harmless, as all the evidence showed that the child, in fact,



intestate, was in the exercise of due care and was not liable for contributory negligence.

The other criticisms of the instructions given for the jury are disposed of by the opinion in the case of *Ill. State v. L. & N. W.R.R.Co.*, 141 Ill., App., 44. The principles of law of fault of appellant's refused instructions were fully presented in the opinion that were given, and there was no error in the refusal of the instructions.

Under the numerous decisions in *Ill. State v. L. & N. W.R.R.Co.*, the verdict is not excessive. *U.S. Mining Co., v. Stoltenberg*, 115 Ill., App. App. 35; *Chicago City Ry. Co., v. Stoenberg*, 129 Ill., App. 511; *C.F. & M.I. Ry. Co., v. Boyd*, 111 Ill., App., 380; *West Chicago St. Ry. Co. vs. Stoltenberg*, 62 Ill., App. 480; *Ill. Ry. Co., v. Root*, 106 Ill., App. 184; *C. & M.I. Ry. Co., v. Root*, 138 Ill., App. 352.

We find no reversible error in the case and the verdict will be affirmed.

ALLIANCE.

18-1114-8



At 0.1 -

Henry Harriage,  
Appellee-

VS.

Electric Tool Company,  
107 Madison,  
Amherst-

from Circuit Court of  
Wilson County.

1881A 142

EDDIDGE, J.

This is an action on the part brought by Plaintiff against Defendant in the Circuit Court of Volusia County to recover for personal injuries received while working in 1942-43's mine. A verdict was rendered finding Plaintiff guilty and assessing Plaintiff's damages at \$1,545, on which verdict judgment was rendered and to review said judgment this appeal is presented.

The declaration consists of four counts. First, third and fourth charge defendant with common law negligence. The second count is predicated upon the alleged violation of Section 11 (a) of the Mines and Minerals Act of 1907, which was in force at the time of the injury. In the view of the law, each count must be sustained upon the second count, and it will be unnecessary to consider any errors assigned except such as apply to the second count. The plaintiff alleges that under said count, defendant, and two other charges that on February 4th 1911, the plaintiff was employed in a coal mine in Westchester. Plaintiff was in the employ of defendant as a coal digger; but in the absence of the mine it was necessary for him in order to enable him to work as a coal digger in the southeast main entry in said mine, and was used as a double track haulage road on which six trains of mine cars were run by machinery; but plaintiff was not allowed to travel on foot between their work through said entry; but defendant allegedly failed to cut in the said walls of said haulage road all of which were less than 3 feet in depth, 4 feet high and 5 feet high in places less than 20 yards apart, or provided a clear place of at least 3 feet between the sides of the cars travelling on said haulage road and the side of the road; that while travelling on foot to his work



in said entry a train of cars, or trip, struck him by reason of defendant's wilful failure to comply with the statute and plaintiff was unable to escape from said cars or trip and was crushed between the same and the side of the entry and had his hip broken and was otherwise permanently injured. The defendant filed the plea of general issue to all the counts.

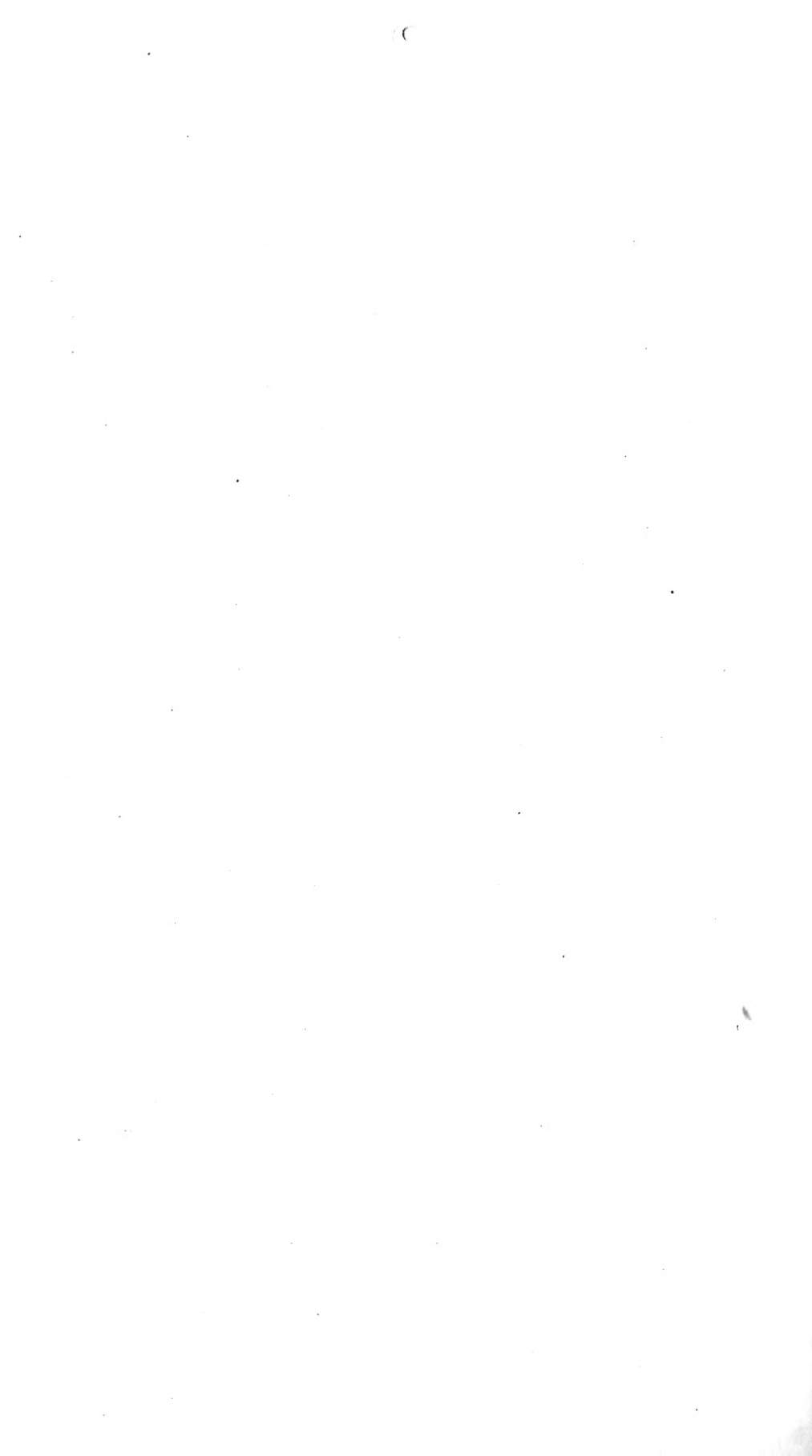
At the time of the accident the mine of the defendant was constructed with a perpendicular shaft from the bottom of which an entry known as the east main south entry ran south. From this east main south entry other entries had been made to the east, which, at the time of the accident, were not being operated. A circular entry, called the runaround, connected the various entries. Originally there was another entry which ran south from the bottom of the shaft parallel with the east main entry and which was called the back south entry. This back south entry had previously been used as a passage way for miners to travel on foot to and from their work and as an air passage and in which there was no haulage cars, but at the time of the accident had been permitted by plaintiff to have become filled with water and debris and for some time prior thereto had been impassable, and abandoned. For this reason the miners in going to and from their work were compelled to pass through the east main south entry, or haulage way. In this haulage way there was laid a track upon which cars were drawn by a rope haulage system operated by a steam engine located near the bottom of the shaft. The haulage system was about 4500 feet in length, running south along the east main south entry 3000 feet, thence east about 1500 feet, to the latch. It was over a mile from the bottom of the shaft to the place where the miners worked. It is conceded that at the time of the accident no places of refuge were constructed and maintained in this haulage way as required by Section 21 of the Statute, and that there was not a clear space of 3 feet on either side of the entry between the sides of the cars and the entry, but it is contended that the failure to provide said place of refuge was not the proximate cause of the injury.



Appellee, to go through five other miners, descended the shaft in the cage about 6:32 o'clock on the main line. Immediately on arriving at the bottom, appellee and the five miners, Alfred Timmet, started to walk to their work along the haulage way. When they came to its junction with the runround, a trip of cars, standing partly on the entry and ~~mostly~~ partly on the runround, blocked the way, and they climbed into a car with the intention of climbing over it and proceeding upon their way. Just as they got into the car, the trip started and they stood in it as it ran about six car lengths, when it stopped. They then climbed out and walked down the haulage way toward their places of work. While they were walking down the middle of the track, Timmet noticed, by the rope moving, that the trip had started toward them again, jumped to one side and at the same time called to appellee to watch out. Appellee attempted to run to the side of the entry and while doing so, the first car of the trip hit or pushed him against the side of the entry between two timbers. This did not injure him, however, and by squeezing himself closely to the side of the entry, six of the cars passed without injury, but the seventh, being nearer to the others, ran also having an iron standing fire at its side, crushed him and broke his hip.

The evidence shows that since the abandonment of the back south entry, the original passageway for the miners, it had been the custom of appellant to start a trip of about 40 cars into the line through the haulage way each morning at about 6:45 o'clock, at which ~~moment~~ cars the miners could ride to their places of work. Appellant sought to prove that the miners were forbidden to walk to their work through the haulage way and introduced the following rule which was posted in the mine, in support of his contention:-

"NOTICE: All employees of this company are hereby notified to keep off the rope haulage roads of this mine. Under no circumstances will any one be allowed to travel in or out of this mine on the rope haulage road except under the direction of the mine manager or his assistant. Any one violating the above rule will be discharged".



-4-

The evidence of appellee tends to show that said rule was not enforced and that the miners either rode or walked to their work as they saw fit, and that appellant knew this fact. We are of opinion that the weight of the evidence supports appellee on this question. While the evidence ~~in~~ does not show when the above rule was adopted or posted, it is a fair inference from the evidence that said rule was put in force when the back south entry was used by the miners in going to and from their work, and while it remained posted after the abandonment of said entry, it had no application at the time of the injury. No reference is made therein to the fact that appellant would haul the miners to their work through the haulage way in cars. Also all the evidence shows that that part of the rule forbidding them from returning from their work on the rope haulage roads was not enforced at the time of the accident. There is no pretense that appellant hauled them from their work. They all traveled out on foot, in fact there was no other way for them to get out. Furthermore, the night boss and his assistant each ~~testified~~ testified on behalf of appellant that they warned the miners that morning not to go into the haulage way until the trip had been pulled out on to the entry. If the miners were not in the habit of walking through the haulage way, and appellant knew that fact, it would seem to have been unnecessary to have given this warning. It is evident that this rule was not adopted to apply to the conditions as they existed after the abandonment of the back south entry, but was adopted prior to the use of the haulage way for the miners to go to and from their work, and was not in force at the time of the accident. Moreover, appellant itself having abandoned part of the rule, appellee had a right to assume that all of said rule was abandoned. Appellant cannot rely on a rule that it itself did not observe. It is admitted that the miners had to walk through this haulage way ~~in returning from~~ in returning from their work, and if there were some within the provisions of section 21 of said act.

The giving of two instructions on behalf of appellee is assigned as error. These instructions were given on the first trial of





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this case, and on the appeal from that judgment (Marriage vs. Electric Coal Co., 176 Ill. App. 451), were not assigned as error. The pleadings and evidence on this trial are substantially the same as they were on the first trial. Alleged errors which existed on the first appeal and not assigned for error, cannot be urged on a second appeal. If they had been assigned on the first appeal this court would have had an opportunity of considering them, and it well take could have pointed out the errors and thus a repetition of them could have been avoided on the second trial. Spitzer v. Schlatt, 249 Ill. 416; Muren Coal & Ice Co. v. Howell, 217 Ill. 190; Insk vs. City of Chicago, 211 Ill. 183. However, the first of said instructions was in regard to the law as to the preponderance of evidence, and while subject to criticism, could not have misled the jury, and the giving of it would not justify a reversal of the judgment. The other was given in relation to one of the common law counts and if erroneous, the giving of it was harmless error.

It is also urged that the Court erred in refusing to give two instructions offered on behalf of appellant. The first of these it is insisted is sustained by the case of Schlapp v. McLean County Coal Co., 235 Ill. 630. The rule announced in that case must be considered in connection with the facts to which it was applied. In that case the accident and injury happened without warning and were instantaneous, and the evidence showed that a place of refuge could have been unavailing if it had existed, and consequently the failure to provide one was not the proximate cause of the injury. The facts here are very different. Appellee was walking down the center of the entry, when Finnet warned him that the trip was coming. He knew that there were no places of refuge in front of him to which he could go to seek safety, he did what evidently in his judgment was the only thing he could do, ran to the side of the entry on the chance that there might be space enough for the cars to pass him without injury. Under such a state of facts it certainly was the province of the jury to determine whether the failure to provide places of



refuge was the proximate cause of the injury. *Pruntyworth v. Fore-*  
*one Coal Co.*, 260 Ill. 202, and cases cited therein. This refused  
instruction was inapplicable to the facts in this case. The second  
refused instruction related to the law under one of the common  
law counts, was erroneous and there was no error in refusing it. Sev-  
eral of the instructions given for appellant were much more favora-  
ble to it than were warranted under the law. The damages awarded are  
not excessive for the injuries sustained and the judgment is affirmed

A F F I R M E D.

St. Martin's Day

145  
Jan. 10, 1925-

October 1, 1925, 1925 -

Lawrence D. Benedict,  
Appellant.

John J. Jones, et al.,  
Appellees.

WILLIAM, J.

188 I.A. 145

This is a motion of the appellant for a writ of habeas corpus  
written instrument:-

"In consideration of the purchase price of the  
timber described in the deed of sale, and in consideration of  
Sections 2, 5, 10 and 11, Township 31 North, Range 1 East,  
hereby agree to indemnify L. D. Benedict, his heirs or assigns, and  
any loss or damage which may be claimed by him or his heirs or assigns  
of any mortgage or incumbrance on the above described land.

(Signed) J. J. Jones,  
Appellees."

Appellees sold by bill of sale to appellant the above described  
about 300 acres of land for the purchase price of \$10,000. The  
lands, together with others, were incumbered by a mortgage. At  
the bill of sale was executed and delivered, the same were  
set out was executed. Appellant began to remove timber from  
the land and cut timber there from the same. When a bill of  
filed to foreclose the mortgage on the land as incumbered by  
moving and the timber from the premises. Appellant sought  
modification of the injunction so that he might remove the  
remove from the premises the timber remaining on the land  
cut. The case was tried before the court, and the court  
the issues in favor of appellant. Appellant was awarded  
70% of the amount of the purchase price of the land as  
interest thereon, the full amount of the purchase price of the  
in procuring the modification of the injunction and the  
closure suit. The bill of exceptions does not contain an  
out in full, but simply states what the appellant was



- -

to show. In the bill of exceptions it is stated that evidence for appellant tended to show that at the time appellant was enjoined from removing any further timber from the premises the remaining timber thereon had a reasonable cash market standing value of \$11,000., and that it could be manufactured ~~manufactured~~ and sold at a profit above that amount; that the evidence for appellees tended to show that the timber so remaining at said time had a market value of not over \$600; that in or about said time appellant had received ~~approximately~~ approximately \$4,300.00- there he sold of the products of said timber and had on hand to be sold of the same about \$100. worth of said products, and that appellees never received but \$1500.00- of the \$2250.00 consideration mentioned in the bill of sale. The contention of appellant is that the Court adopted the wrong measure of damages, that the timber sold under the bill of sale became personal property and that appellant was entitled to the profits that could be derived from the timber remaining uncut made up into manufactured articles.

The only consideration for the indemnity agreement was the executed bill of sale. This was not sufficient consideration to support the contract of indemnity, but as appellees have assigned no cross-error on which this Court will be authorized to reverse the judgment and award the costs, the judgment of the circuit court will be affirmed.

A. C. H. H. H. H.

2036



Gen. No. 1155.

Oct. Term, 1911 -

1911 -

Filed July 1, 1911 -

Frances Van Vorster,

Appellant,

VS.

Appeal from Circuit Court

Metropolitan Life Insurance

Company, a corporation,

Company, a corporation,

Appellant.

188 T. A. 166

ELMER, J.

Since the suit is assumpsit, the plaintiff is entitled to recover the amount of the policy issued by it on the life of Clara E. Cake. The only errors assigned relate to the cause of action charged in the second count of the declaration, which was based upon a policy for \$1000.00., dated October 11, 1910. The first count appellant filed nine pleas, the first being the general issue and the other eight special pleas setting up alleged false answers made by said Clara E. Cake in her application for the policy. To these special pleas replications were filed. The first of these issues in favor of appellant and the second is from the judgment entered on said said verdict.

The beneficiary in the policy was the husband of the insured, Charles E. Cake, but the policy was assigned by the insured and her husband August 21, 1911, to appellant. Clara E. Cake died December 23rd 1911, of pneumonia. The application and policy constitute the contract of insurance, and by the terms thereof, the alleged false answers and representations are warranties. The burden of proving the falsity of the answers is on appellant. The principal issues are raised by them and the replications. First, were the questions in controversy asked of her and answered, and did she give the answers as set out recorded, and second, if so, were such answers knowingly false? The first issue is general and applies to all the issues, while the second is to







or tumor?". The weight of the testimony undoubtedly shows that the insured had cancer of the breast at the time she was examined by Dr. Sprague and the material question is whether she knew of it at that time and falsely represented that she was not so afflicted. In November, 1909, she was operated on at Mercy Hospital by Dr. Sawyer, and cancerous tissue removed, but Dr. Sawyer testified that he did not tell her that she had cancer, but told her that she did not have any malignant growth. Dr. Goodkind in May, 1910, examined her and discovered lumps on her breast and advised her to see Dr. McArthur, but did not tell her that she had cancer. Dr. Maxwell examined her in July or August, 1910, and also in November, 1910, but did not tell her that she had cancer. She visited Dr. Thomson in September, 1910, and had him examine her and stated that she wanted to use his testimony in a suit for malpractice against Dr. Sawyer for operating on her when an operation was unnecessary. Dr. Thompson did not tell her that she had cancer, but advised her not to bring the suit. From June 25th to July 1st, 1911, she was confined in a hospital in Springfield suffering with neurasthenia, and Dr. Colby attended her. Dr. Colby told her that in his opinion she had cancer, but he strenuously insisted that she did not. All the above physicians were witnesses produced by the plaintiff with the exception of Dr. Maxwell. ~~Staphylococcus~~ Two physicians, Dr. McDonald and Dr. Spitz, testified that she admitted to them that she had cancer, but to think the weight of the evidence shows that she was firm in the belief that she was not afflicted with cancer, and this belief was wholly reasonable from the fact that Dr. Sawyer, who operated on her and made a microscopical examination of the tissues, assured her that she did not have cancer, and she persisted in this belief up to the time when Dr. Colby was attending her shortly before her death. Under these circumstances, if the above question was asked no answer given as noted in the application, the weight of the evidence does not show that the answer was falsely made.









The seventh plea is based on this question, "When were you last confined to the house by illness?" Answer, "Never". The evidence does not show that he was ever confined to her home by illness.

The eighth plea is based upon the question, "Have you had any other illness than the above named?" Answer "No". The evidence does not show that she ever had any other illness except trivial complaints.

~~The ninth plea is based~~

The ninth plea is based upon the question, "Have you had any other medical attendant, or have you been prescribed for by any other physician than the above named?" Answer, "No". No physician had been named in the application and consequently the answer was literally correct.

In connection with the questions embraced in the 6th, 8th and 9th pleas., if there had been any misunderstanding thereto there was another question in the application which, if an answer had been required, would have covered these matters fully and would have removed any doubt in regard to them. This question was as follows, "Give full particulars of every illness you have had since childhood, and name of every physician who has ever attended you or prescribed for you". And under this question were columns headed, ~~xxxx~~ respectively, "Affection. Number of Attacks. Date. Duration. Severity. Complications. Results. Medical Attendant". Through this question and the blank spaces for ~~xxx~~ the answers thereto the applicant drew another large cross, showing that the question was not asked nor any answers required thereto. By striking out ~~cix~~ of this question in the application, together with the striking out of the other important questions above noted, and the applicant being a female, were sufficient to put the plaintiff on inquiry upon notice if the application was not satisfactory. It accepted the application in this condition and issued its policy thereon, and is not estopped from ~~xxxx~~ questioning the integrity of the answers expressed in said application.

The judgment of the circuit court will be affirmed-

f. a. - Original -

Gen. No. 6139.

Oct. Term, 1913-

Arg. No. 40-

Filed July 2, 1914-

Frank Thoole, Plaintiff, in Error-

VS.

Error to McJ an.

Illinois Traction Co.,  
Defendant in Error-

188 I.A. 214

Thompson, P.J.

This is the second time this case has been before this court. A statement of the pleadings and the evidence as it appeared on the first trial appears in 171 Ill., Apr. 198. At that trial the court instructed a verdict for the defendant at the close of the plaintiff's evidence. This court reversed and remanded the case for the reason there was sufficient evidence to require the issues to be submitted to a jury. On the second trial, a jury returned a verdict for the defendant on which judgment was rendered. The plaintiff prosecutes a writ of error to review that judgment.

The plaintiff testified on the last trial in his own behalf, substantially as on the former trial in regard to the manner in which he was injured. It is insisted that after he had been cross examined, the court erred in sustaining objections to questions put to him on re-direct examination as to whether from the time he quit work up to the time he was struck he noticed the plank that struck him? The court in sustaining the objection remarked, it might be asked whether he took any special notice. The form of the question was then changed and the witness was asked and answered fully what he saw. It was within the sound discretion of the court to permit the witness to be re-examined, and the court did permit a liberal re-examination concerning things about which the witness had testified fully in his ~~first~~ first examination.

It is also contended that the court erred in permitting the defendant to ask the court reporter if a witness, Stenstrom,



testified on the subject of a warped plank on the first trial, and in refusing to permit the plaintiff to show by the reporter that said witness was not asked any question about a warped plank. The record shows that the ruling of the court was changed, and at plaintiff's request the entire testimony of the witness, "tenstrum, at the first trial was read to the jury. The last ruling of the court cured any possible error in the first ruling. We find no error in the rulings on admission or rejection of evidence.

It is also argued that the court erred in giving an instruction on the question of fellow servants. It is not contended that the instruction does not state the law correctly. The last ~~maxx~~ instruction ~~maxx~~ requested by the plaintiff and read to the jury involves the question of ~~of~~ fellow servants. The plaintiff may not complain of the giving of an instruction on a legal question involved in his own instructions.

It is also contended that the defendant's "Seventh instruction informs the jury that if the injury was the result of an accident the jury should find the defendant not guilty". The instruction as given is, "If the jury believe from the evidence that the injury to plaintiff was the result of an accident, and not of negligence on the part of the defendant, then they should find the defendant not guilty. The instruction states a correct proposition of law and there was no error in giving it. Complaint is made of other instructions but on a careful examination of the instructions we do not find any error. The jury appear to have been ~~carefully~~ fully and properly instructed on all questions involved in the case.

It is contended that the verdict and judgment are against the weight of the evidence. The evidence on behalf of defendant in the record at this trial, tends to show that plaintiff was not an ordinary workman, but was a foreman in charge of a gang of six men, and that O'Connor, the road master, whom the evidence on the former trial showed <sup>Gave</sup> the order to place the planks on the car, did not give such orders. It was said in the former opinion



that it was a question of fact , for a jury to decide from the evidence , whether the defendant was guilty of the negligence alleged and the plaintiff was in the exercise of due care when injured. Reasonable men might disagree on these questions when all the evidence in the present record is considered. It was very properly a case ~~as~~ to be decided by a jury and there being no error of law in the case, the judgment must be affirmed .

A F F I R M E D.

8-8-1001

8-8-1001



Oct. 27, 1911 -

12-11, 12-11-

Robert Allen, 110 S.

Edna 20 1910r., 1 m.

Thompson, J.

1881 A. 220

[illegible][illegible]



In September, 1911, the plaintiff loaned her \$1000 in notes each for \$210. The notes were from March 1, 1911, to March 1, 1914. Wm. T. Miller, discounted one of the notes on May 11 - 1911 for \$150. of the proceeds he gave to the plaintiff in full of all preceding. In March 1911, plaintiff borrowed \$1000 on a note to the John Hancock Life Insurance Company, payable in five years with interest at the rate of five per cent per annum, with the privilege of paying the same in full at any interest payment period. This note was secured by a mortgage on her ~~land~~ land. Only \$2,712 was obtained for the mortgage. Mortgage, \$1200. Plaintiff borrowed as a loan, \$150 to keep her quiet. Plaintiff paid for the mortgage. The money received by plaintiff from the mortgage was used to pay her debts. Plaintiff took a note from her brother, but she ~~left~~ let him have the proceeds of \$1,000. note, but ~~she~~ shortly before the time of the trial in the circuit court took from him a note for \$2,150. dated back to the date of the mortgage. This note recites that it is given to secure a claim against any loss in the event of her brother's failure to pay the interest and principal of the mortgage loaned by him to the Insurance Company.

In the trial in the circuit court to give evidence for the on behalf of the plaintiff concerning the age, mental powers and characteristics of a defendant, it was shown that he had a mind like a child, - as he had started in the business after she had taken on, the defendant, as associates, had qualified him, but he was not qualified in opinion on her mental condition, and he was not permitted to answer over objection concerning the same on behalf of plaintiff's counsel:- "Do you think he could understand the nature of a mortgage for \$1,000. secured by a mortgage on her land?" "Do you think from your observation in that connection or have he with her that he could understand the nature and effect of a note, coupons and interest, or







estate of Edna Miller. This is an assumption by the jury that it may, or may not be true. It was not the duty of the court to submit to the jury in an instruction. The court's duty is to submit the facts to the jury and let the jury decide. If the jury's judgment is reversed and the case retried.

Reversed and remanded.

1913-

W. G. Cockburn -



Gen. No. 6187.

April Term, 1914-

Ag. No. 10-

Filed July 2, 1914-

Oscar Mandel and Albert Schwarzsach,  
Defendants in Error-

VS.

;

Error to Mc Lean.

Bloomington & Normal Ry. & Light Co.,  
Plaintiff in Error-

188 I.A. 227

Thompson, P.J.

This is an action on the case to recover damages for injury to a team of mules, a wagon and harness ~~by~~ caused by being struck by a street car of the defendant. A trial resulted in a verdict for \$350. against the defendant on which judgment was rendered. The defendant has sued out a writ of error.

plaintiff in error operates a street railway on Market street which runs east and west in the city of Bloomington, Roosevelt Avenue intersects Market street and has an incline of over six per cent from the north. On December 20<sup>th</sup>, 1912, an employee of the defendants in error drove their team and wagon loaded with groceries down Roosevelt avenue and at the intersection of Market street was struck by the street car of plaintiff in error. There is a sharp conflict in the evidence as to the rate the team was being driven and at which the car was running. The testimony for the plaintiff in error tends to show that the team was driven at a gallop or as fast as it could run down the hill, and that the car was only running six miles an hour at the time of the collision, while the testimony for the defendants in error tends to show that the team was only going at a walk and that the car was going at the rate of twenty-five to thirty five miles an hour and that a gong or bell was not sounded before the collision. Witnesses for defendants in error testified that the car pushed the team from 135 to 175 feet after crossing Roosevelt avenue, and the employees of plaintiff in error testified that the car went 90



feet after striking the team and stopped with the mules under the car. The driver of the wagon testified that he looked east, the direction the car came from, just before he got on Market street and did not see a car and then looked west and on again looking east the car was on the crossing and that in attempting to avoid the car he turned the team west on the track when it was struck by the car. The distance that the car went, pushing the team ahead of it after the collision occurred, tends to corroborate the evidence of defendants in error as to the speed at which the car was running.

The questions of whether the driver of the team was in the exercise of ordinary care and the plaintiff in error was guilty of negligence as averred were, in the conflicting state of the evidence peculiarly within the province of the jury to decide and this court cannot say that the verdict is against the preponderance of the evidence.

It is argued that the court erred in restricting the cross examination of the driver of the team. We have read the record and are of the opinion that counsel for were not unduly restricted.

One witness testified that he was not an expert on mules but knew the value of them. He was then permitted to testify to the value of these mules. We fail to see why he was not competent. The pleasantry in the first part of this answer did not disqualify him.

It is also insisted that the court erred in giving the ninth instruction requested by defendants in error which is:- "The jury are the judges of the questions of fact in this case, and the court does not by any instruction given to the jury in this case intend to instruct the jury how they should find any question of fact in this case". The instruction should have said "from the evidence in the case under the instructions of the court", but the jury were fully instructed and the technical error is not sufficient cause for reversal since the jury could not be misled by it. C. & A. R.R.Co., vs. McDonnell, 194 Ill., 82; ~~Smith~~



South Chicago Ry. Co. v. McDonald, 196 Ill., 204-

It is also argued that the court erred in refusing plaintiff in error's second refused instruction. The instruction told the jury that it was not material whether a gong was sounded if they believed "the driver" of the team saw, or could have seen, heard, or could have heard the car by the use of reasonable care on his part". Under this instruction, if it was possible for the driver to have seen or heard the car it was immaterial whether the gong was or was not sounded. The law does not excuse the failure to sound a gong on the possibility of the traveller seeing or hearing a car in the exercise of due care, but only if in the exercise of ordinary care he would or must have seen it.

It is also contended that the court erred in refusing certain instructions one of which is called by the plaintiff in error a "stock instruction". This and another conclude with this statement. "No juror should consent to a verdict which does not meet with the approval of his own judgment and conscience after due deliberation with his fellow jurors after fairly considering all the evidence admitted by the court and the law as given in the instructions of the court". These instructions tended to encourage and invite a disagreement. They were properly refused. City of Evanston vs. Richards, 224 Ill. 444; C. & E.I. R.R.Co., vs. Rains, 203 Ill. 417. The jury were fully instructed.

Finding no reversible error in the case the judgment is affirmed.

A F F I R M E D.

1914-

E. B. Myers - J -

Filed July 2, 1914-

John Richardson,  
Appellee-

VS.

; Appeal from Colos .

W.H. Johns,  
Appellant.

Thompson, P.J.

188 L.A. 234

This is a suit in assumpsit brought by John Richardson against W.H. Johns on a note for \$800. dated May 22, 1904 purporting to be signed by Johns and others. The defendant filed a verified plea denying the execution of the note. A jury returned a verdict finding for plaintiff on which judgment was rendered, and the defendant appeals.

The plaintiff and another witness, Willson, testified that they were present and saw the defendant sign the note. Three other witnesses testified that they knew the signatures of Johns and that they believed the name W.H. Johns, signed to the note, was his writing.

One of these witnesses, Felix Johnson, president of the Second National Bank of Charleston, testified that he knew Johns; that Johns kept an account at the First National Bank of Charleston and for several years he had received and paid checks drawn by Johns on the First National Bank and that Bank had always in due course received and paid the checks received by the witness. He was then asked if the signature to the note was in the writing of the defendant and the witness answered that it looked like his signature. It is contended that this was error. The record contains no objection to the question concerning the signature to the note so that the competency of the question and answer is not saved for review.

A witness Cyrus Beavers testified that he had known Johns thirty years, and had seen him write as far back as 1903, and had seen him sign checks in payment for corn for five years and that he knew his signature. He testified that the signature to the note sued on was in the writing of Johns. It was developed on cross examination that this witness has a note against Johns, which Johns denies making, and that he had compared sig-





natures of Johns on checks with the signatures on the note sued on and his own note since this controversy arose. A motion to exclude his testimony was overruled, this ruling is assigned for error. The facts developed on the cross examination did not render him incompetent to testify to the signature but only affected his credibility.

It is also contended that the court erred in permitting the witness, Messick, who had seen the defendant execute a note on May 10, 1913, testify concerning the signature in controversy. There is no objection in the record to any of the testimony of this witness and therefore no question is saved for review concerning the evidence of this witness.

It is also contended that the court erred in the giving of two instructions at the request of plaintiff concerning the credibility of the witnesses. These instructions are in the form that has been repeatedly approved.

Finding no error in the case the judgment is affirmed.

A F F I R M E D.

2-25-30-3  
K. L. Langley

Gen. No. 6228.

April Term, 1914-

No. 45-

Filed July 2, 1914-

George E. Luce,  
Appellee-

VS.

; Appal from Felcan.

E. P. Armstrong,  
Appellant.,

Thompson, P.J.

188 I.A. 248

This is a suit begun before a justice of the peace by appellee to recover from appellant a balance claimed to be due for some hay shipped by appellee from Hope, North Dakota, to appellee at Bloomington. A judgment in favor of appellee was rendered in the justice's court. An appeal was taken to the circuit court where on a trial before a jury a verdict was returned for \$151.75 in favor of appellee on which judgment was rendered.

The appellee took the evidence of several witnesses by depositions in Dakota. Appellant made a motion to suppress the depositions which was overruled and it is now contended that this ruling was error.

The bill of exceptions does not contain any motion to suppress the depositions or exception to the ruling thereon. A bill of exceptions is necessary to present for review rulings on motions and anything outside of the proper common law record. Schafer vs. Gerbers, Ill., ; Sturtevant Co. vs. Sullivan, 69, Ill., App. 47; Brown vs. Kennedy, 138, Ill., App. 607; Jacob vs. C. & E.I. R.R. Co., 145 Ill., App. 140. While the motion and ruling thereon are in the record and the clerk has written an exception to the ruling, that does not save the question for review. This court can only review a ruling on a motion, when the question is preserved in the bill of exceptions.

Appellant wrote from Bloomington to appellee at Hope, North Dakota, that he would pay \$15. per ton "your track for A. No. 1. timothy hay and \$12. per ton for A. No. 1, clover, your track". Appellee shipped to appellant three car loads of timothy hay with drafts for \$389.75 attached to the bills of lading and this suit is to recover the balance of the purchase price.



The defence was that the hay was not of the quality mentioned in the correspondence. The evidence was conflicting as to the quality of the hay, but with the exceptions of two tons of prairie hay, and for that a deduction was made, the preponderance of the evidence clearly sustains the verdict and the judgment does substantial justice.

Appellant claims ~~that~~ there was a difference between the weight of the hay at Hope and at Bloomington, and insists ~~that~~ that he bought the hay to be weighed and graded according to the custom ~~of~~ at Bloomington. The proposition of appellant under which the hay was sold to him was to pay \$15.00 per ton for timothy "Your track". When the hay was placed in the cars at Hope and billed to appellant it was delivered to him there and was at his risk from that time.

There is a discussion of some of the given and refused instructions. One of appellants instructions omitted the word "timothy" in describing the hay, and used the letters F.O.B. instead of the words "your track". The meaning of the letters F.O.B. was not defined in the instruction. The term F.O.B. is one ~~of~~ in common use and its meaning is so well understood that we fail to see, when the hay was delivered free on board the cars at Hope, how a jury could be misled by its use or by the omission of the word timothy.

The jury were fully instructed concerning the law and we find no reversible error in the case, the judgment is therefore affirmed.

A F F I R M E D.

4-B-Nigro-

Filed July 2, 1914-

S.J. Danskin, Administrator with the  
Will annexed of Karl D. Danskin., Deceased.  
Appellant.,

VS.

; Appeal from Circuit Court,

Margaret A. Denny and John J. Denny,  
Appellees-

Sangamon County.

ELDREDGE, J.

188 I.A. 267

Appellant as administrator of the assignee brought this action in assumpsit to recover on a promissory note for the principal sum of \$3,300. dated at Hillsboro, N.D. June 5, 1909, and payable on or before January 1, 1910, to Brown-Danskin Company, and purported to be executed by appellees. Appellees filed several pleas including the general issue, with an affidavit denying the execution of the note. The only evidence offered was on that issue and there was only one instruction on each side and they related only to the execution of the note. The jury rendered a verdict in favor of appellees, on which verdict ~~xxx~~ judgment was entered. &- No question is raised except that the clear preponderance of the evidence shows that appellees signed the note. There was a sharp conflict of evidence on this issue and no useful purpose would be served by discussing the evidence in this opinion. From a careful consideration of the evidence we cannot say that its manifest weight is in favor of appellant. The jury saw and ~~xxx~~ heard the witnesses and the trial court approved the verdict of the jury. The jury and the trial court had a superior opportunity of judging the credibility of the witnesses and under the evidence disclosed by the record we feel constrained to abide by their finding.

The judgment will be affirmed-

A F F I R M E D.

1913-

J. A. Bickerton -



# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSAUGH, Clerk.

W. S. PAYNE, Sheriff

And afterwards in Vacation, after said March term, to-wit: On the 13th day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

The People &c

ERROR TO  
APPEAL FROM

vs.

No.

8

March Term, 1914.

Circuit

COURT

Hamilton

COUNTY

Jones

TRIAL JUDGE

Hon.

E. E. Nestlin

188 I.A. 278



Term No. 8.

March Term 1884.

The People of the State of Illinois,  
Defendant in Error,

v.

Thomas H. Jones,

Plaintiff in Error,

Opinion by Higbee, J.

1884 A. 278

Thomas H. Jones, plaintiff in error, was removed and brought before a Justice of the Peace on appeal from the judgment of A.J. Mangis, charging him with "the criminal offense of trespass by wilfully entering and passing over an improved field of another being expressly forbidden to do so by the owner of the said field." Plaintiff in error was found guilty by the Justice of the Peace, on appeal to the County Court, and the jury returned a verdict of guilty and assessed damages of \$100. Motion for a new trial having been overruled, plaintiff in error brought his judgment of said Justice of the Peace for the purpose of testing and cost and he brings the record here for review.

The proofs show that said Thomas H. Jones and his brother owned the east half of the southeast quarter of section 16 of township five range seven in Shelby County, Illinois. Plaintiff purchased the same about 1865 and the said Thomas H. Jones purchased the same about 1868. Plaintiff purchased the south half of the northeast quarter of section 16 of township five range seven in Shelby County, Illinois, in 1861 from his brother, who had owned it. The north forty of the Jones eight acres, therefore, is the east forty of the Mangis eighty, which is, directly, the same.



There was a conflict between the respective owners as to where the division line was located and there was and is a strip of land about six rods wide at one end and thirteen at the other, extending east and west at the junction of the two forties claimed by both Jones and Mangis. Mangis claimed, and the evidence at least tended to show, that he had held such strip of land under the claim of ownership and of adverse possession for more than twenty years. On the other hand Jones claimed and introduced evidence for the purpose of showing, that the greater part of the strip had been abandoned for a number of years, and had been permitted to grow up in brush and young timber; that he did not know until the spring of 1913 that Mangis had lately attempted to cultivate any part of it. He also introduced surveys in evidence, tending to show the land in dispute was a part of his north forty acres. It is not disputed that Jones and those assisting him went upon the land in controversy and put a fence along the north side thereof and his act in doing is the offense complained of. Jones while insisting upon his ownership of the property, relies also as a defense upon the claimed fact that he was not expressly forbidden to enter the premises in the manner required by statute to be done before he could be held guilty of the offense of trespass. In this matter the evidence is meager and unsatisfactory. Mangis testified that in 1907 the highway commissioners talked of putting a road through between the two forties and he then prepared a notice addressed to Jones and the highway commissioners, forbidding him to come upon the land and caused his sister to post it up in the disputed strip. He also stated that Jones came to him "last spring" and wanted to know what he was going to do about it.

there is no conflict of evidence as to the fact that the  
the straddle line was located and the straddle line was  
land about six rods wide at the point where the straddle  
extending east and west of the junction of the straddle  
claimed by both Jones and Smith. In the straddle  
evidence at least tended to show that the straddle  
of land under the claim of ownership of Jones and Smith  
for more than twenty years. On the other hand, the  
and introduced evidence for the purpose of showing that  
greater part of the straddle had been used as a  
years, and had been admitted to grow up in the straddle  
timber; that he did not know until the spring of 1907  
had lately attempted to cultivate any part of it. The  
duced surveys in evidence, tending to show that the straddle  
was a part of his north forty acres. It is also shown  
Jones and those assisting him went upon the land in 1907  
and put a fence along the north side thereof, and the  
doing is the offense complained of. Jones also testified  
his ownership of the property, relied also on the fact  
claimed fact that he was not expressly forbidden to  
premises in the manner required by statute to be  
could be held guilty of the offense of trespass.  
the evidence is meager and unsatisfactory. The  
in 1907 the highway commissioners failed to locate the  
through between the two parties and he then reported  
addressed to Jones and the highway commissioners, Smith  
to come upon the land and caused his estate to be  
disputed straddle. He also stated that Jones came to the  
spring" and wanted to know what he was going to do with

fence and that he told Jones he had nothing to say about the matter and that he wanted him (Jones) to keep off the premises. Martha Mangis a sister of the complaining witness, testified that she put up the notice referred to by him; that it was signed by A.J. Mangis, addressed to Jones and the highway commissioners, that "the substance was for them to stay off of his place, not to come there and make a road". Jones positively denies that Mangis ever told him to keep off his premises or states that he never read the posted notice and did not know the contents of it.

Under the statute, before Jones could properly be found guilty of trespass he must have been expressly forbidden by Mangis as owner of the premises in question, from entering the same, there being no claim that any notice was given to Jones by a tenant of Mangis, who was in the actual possession of the premises. The written notice which <sup>Mangis</sup> ~~caused~~ to be posted some years before the alleged trespass, was given for the purpose of preventing the commissioners from establishing a road over the disputed territory and was not even seen by Jones to whom it is said to have been directed, as well as to the commissioners, and therefore it could not possibly be construed as the express notice required by the statute as the basis for prosecution for trespass, such as this. Mangis stated that the oral notice given by him to Jones when the latter came to see what he was going to do about the fence was, "I had nothing to say to him at all, and I wanted him to keep off my premises". This notice, if it was of any effect, would appear to us to have been sufficiently definite to constitute

the contents of it.

Under the statute, notice does not have to be given to the owner of the premises if the premises have been leased to a tenant. The statute says that if the premises have been leased to a tenant, the notice must be given to the tenant. In this case, the premises were leased to a tenant, and the notice was given to the tenant. The notice was given to the tenant on the date of the hearing. The notice was given to the tenant in the form of a letter. The letter was signed by the city attorney. The letter was dated the date of the hearing. The letter was delivered to the tenant by the city attorney. The letter was received by the tenant on the date of the hearing. The letter was read to the tenant by the city attorney. The letter was understood by the tenant. The tenant did not object to the notice. The tenant did not appear at the hearing. The city attorney moved for summary judgment. The court granted summary judgment in favor of the city. The court found that the city had given proper notice to the tenant. The court found that the tenant had not appeared at the hearing. The court found that the city was entitled to summary judgment. The court entered summary judgment in favor of the city. The court dismissed the tenant's lawsuit. The court awarded costs to the city. The court entered judgment on the date of the hearing. The judgment was entered in the clerk's office. The judgment was filed with the court. The judgment was made a part of the court's record. The judgment was enforceable. The judgment was final. The judgment was binding. The judgment was conclusive. The judgment was irrevocable. The judgment was unchangeable. The judgment was permanent. The judgment was perpetual. The judgment was forever. The judgment was for all time. The judgment was for ever and ever. Amen.



the express prohibition required by the statute. They were  
where the land was not spoken and these may well have indicated simply a desire  
on the part of Mangis that Jones should not come upon any  
land owned by him, a wish to have nothing whatever to do with  
Jones. The strip of land in controversy seems to have been  
claimed by both Jones and Mangis in good faith and there does  
not appear to have been any wilful desire on the part of Jones  
to trespass or enter upon the land of Mangis, but simply a  
wish to fence in his own land. This suit in fact appears to  
be an attempt to try the title to the strip of land in question,  
which cannot properly be done in a proceeding such as this.

The judgment of the court below is reversed and the cause  
remanded.

Reversed and remanded.

\*\*\*\*\*

(Not to be reported in full).



I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court  
at Mt. Vernon, this 26<sup>th</sup> of July,  
A. D. 1914

Clerk of the Appellate Court

# OPINION

See \$

123 1229

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff

And afterwards in Vacation, after said March term, to-wit: On the 28th day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

~~ERROR TO~~  
APPEAL FROM

Paul Kuhn & Co.

188 I.A. 279

vs.

No.

11

Circuit

COURT

March Term, 1914.

Pulaski

COUNTY

Pulaski County  
Miller Elevator Co

TRIAL JUDGE

Hon.

A. M. Lewis



Term No. 11.

Agenda No. 11.

March Term A.D. 1914.

Paul Kuhn et al, Partners, etc.,

Appellants

v.

Appeal from Pulaski.

Pulaski County Mill and Elevator  
Company,

Appellee.

188 I.A. 279

Opinion by Higbee, P.J.

This suit was instituted by Paul Kuhn and Elizabeth Kuhn, partners doing business under the name of Paul Kuhn and Company, appellants, against Pulaski County Mill and Elevator Company, a corporation, appellee, before a justice of the peace of Pulaski county to recover \$176.10, claimed by appellant to be due to them by reason of an over payment made by them to appellee for certain wheat which was not up to the grade agreed to be furnished by the latter.

Appellants recovered a judgment for the amount claimed before the justice of the peace, but on an appeal to the circuit court where the cause was tried by the court without a jury, the issues were found for appellee and judgment entered against appellants for costs. From that judgment an appeal has been taken to this court by the plaintiff below. There were no propositions of law submitted to the trial court and the only question presented to this court for determination is did or did not the proofs show a right of recovery against appellee.

The evidence shows that prior to July 1, 1910, appellee was a corporation, whose stock which was held by J. J. Davidson,

March Term 1914.

Paul Smith et al. Plaintiffs, etc.  
Appellants

v.

Polaski County Mill and Elevator  
Company.  
Appellee

Opinion by Higbee, J.

This suit was instituted by Paul Smith and others, known, partners doing business under the name of Smith and others, appellants, against Polaski County Mill and Elevator Company, a corporation, appellee, before a Justice of the Peace of Polaski County to recover \$176.10, claimed as wages due to them by reason of an over payment made by them to appellee for certain wheat which was not up to the standard to be furnished by the latter.

Appellants recovered a judgment for the amount claimed before the Justice of the Peace, but on an appeal to the court where the cause was tried by the court without a jury, the same were found for appellee and judgment entered against appellants for costs. From that judgment an appeal was taken to this court by the plaintiff below. In the propositions of law submitted to the trial court the question presented to this court for determination was whether did not the proofs show a right of recovery against appellee. The evidence shows that prior to July 1, 1913, appellee was a corporation, whose stock was held by Paul Smith and others.



wife and James Bartleson, owned and was operating a flour mill at Grand Chain, Illinois, and was also engaged in buying and selling grain at that place. Davidson was the general secretary of the corporation and transacted about all of its business. Bartleson who was president of the company lived at Olmstead, a place about seven miles from Grand Chain. Early in July, 1910 appellee leased its property to Charles Zimmer and Louis Zimmer, brothers, who carried on the business until sometime in February, 1911, when the property was taken back by them to appellee. Appellants were engaged in business at Terre Haute, Indiana, buying and selling grain, Paul Kuhn being in charge of their business. They were accustomed to send out market quotations and these were received by Zimmer Brothers. In the latter part of July, 1910, appellants received the following letter: "Pulaski County Mill & Elevator Co. Incorporated. Manufacturers of Pure Winter Wheat Flour. Grand Chain, Illinois. July 22nd, 1910.

Paul Kuhn & Co.,  
Terre Haute, Ind.

Gentlemen:- Have been receiving your market quotations daily and will be able to do business with you on both wheat and corn. We will telegraph you when we have anything to offer.

Yours respectfully,  
Pulaski County Mill & Elevator Co.  
Chas. Zimmer

No one connected with the Pulaski County Mill & Elevator Company knew of the sending of this letter or had anything to do with it, but it was written and mailed for and on behalf of the Zimmer Brothers. Shortly thereafter a number of telegrams were exchanged between the Zimmers and appellants, relative to buying and selling wheat. Those sent by the Zimmer brothers were all sent with the corporate name of appellee, the name of Zimmer Brothers

[illegible]

... ..

Confession:- Have been receiving your letter and it  
and will be able to do business with you on 1st Dec.  
We will telegraph you when we have finished.

Yours respectfully,  
 (Signature)

No one connected with the United States  
Company knew of the sending of this letter or  
with it, but it was written and mailed  
Zimmer brothers. Shortly thereafter a rumor  
ed between the Zimmer and Bellamy families  
selling west. There was a rumor of the  
with the corporate name, and finally the

appearing, but some of them were followed by letters which were also signed with appellee's name under it being written "Louis Zimmer". Through this correspondence appellants purchased four cars of wheat to be shipped to Terre Haute, which was to grade No. 2 with weights and inspection guaranteed at Terre Haute. In pursuance of this contract four cars of wheat were sent by the Zimmers to appellants at Terre Haute. With each car a bill of lading with draft attached was sent through the bank so that appellants could only get the wheat by paying the several amounts of the drafts which were drawn, on a basis of the price to be paid for No. 2 wheat. When possession of the wheat was obtained by appellants and inspection made, it was found none of it was No. 2, part of it being No. 4 and the balance "no grade". Appellants honored the drafts paid for the wheat shipped them by the Zimmers, paying \$176.10 more than they should have paid had the drafts been based on the actual price of wheat of the grade shipped them. The drafts paid by appellants were signed "Pulaski Co. Mill & Ele. Co. per Louis H. Zimmer", and were dated August 4, 6, and 8, 1910 respectively. A. J. Davidson manager and secretary of appellee testified that when the property was leased he told the Zimmers not to use the company's name and that he did not know they were using it until sometime in the fall which was after the transactions between the Zimmers and appellant had taken place; that he then went to them and told them again not to use the company's name; that when the Zimmers took charge of the mill he took the stationery and the books here with him but left a few paper bags with the name of the company on them; that he did not know where the Zimmers got the letter heads they used, unless they had them printed; that after the leasing of the property he moved to his farm several miles from town; that

appearing, but some of them were to be paid, also signed with appellee's name under the date "Zimmer". Through this correspondence appellee's four cars of wheat to be shipped to Terre Haute, Grade No. 2 with weights and inspection certificates in pursuance of this contract four cars of wheat to the Zimmer to appellee at Terre Haute. The draft with draft attached was sent through the bank of Terre Haute, and the draft was paid by the bank. The draft was for No. 2 wheat. When possession of the wheat was made by appellee and inspection made, it was found that the draft was for No. 2, part of it being No. 2 and the balance "no grade". Appellee honored the draft for the wheat shipped by the Zimmer, paying \$16.10 more than they should have had the draft been based on the actual price of wheat of that grade shipped them. The draft was paid by appellee to "Pulaski Co. Mill & Elev. Co. per Louis H. Zimmer", and on August 4, 6, and 8, 1910 respectively. The secretary of appellee testified that when the draft was cashed he told the Zimmer not to use the company's name, but that he did not know they were using it until sometime after the transactions between the Zimmer and the company had taken place; that he then went to them and told them not to use the company's name; that when the Zimmer of the mill he took the stationery and the name of the company but left a few paper bags with the name of the company that he did not know where the Zimmer got the paper bags, unless they had them printed; that when the property he moved to his firm several miles from

appellee and the Zimmer brothers had separate boxes at the postoffice and he got the company's mail about once a week when he came to town; that the company never did business with, and he did not know nor had he ever heard of appellants until this suit was commenced.

James Bartleson, appellee's president, swore he lived 20 miles from Grand Chain and that he did not authorize the firm to use the corporation name in the transaction of business; that he did not know they were using the same; that he knew nothing of the transaction between appellant and the Zimmers until after the latter had left the mill. That appellee's name was used in the correspondence connected with the sale of the wheat in question to appellant is plain and in fact is not denied, but it is also clear that it was used by the Zimmers without its knowledge or consent and against the express instruction of its manager. There is no evidence even tending to show that it does it appear to be claimed by appellants that the Zimmers were authorized to act as agents of appellee or that the latter in any way knew or profited by the transaction in question. The Zimmer brothers are shown by the proofs to have been clearly liable to appellants for the amount claimed but appellee is not seeking to bind appellee in the transaction with which it has nothing to do because the parties who are liable to respond in damages used appellee's corporate name in carrying on the transaction with which this suit is concerned. Not only does the uncontradicted evidence show that appellee did not authorize the Zimmer brothers to use its corporate name or act as its agent, but the proofs also fail to disclose any act or omission of appellee which could lead appellants to believe that the Zimmer brothers were acting as its agent or the Zimmer brothers to believe that they had a right to the use of such name to act as such agent.

he did not know nor had he ever heard of it. That this suit was commenced.

James Harrison, appellee's brother, lives  
miles from Grand Grap and that he did not  
to use the corporation name in the transaction  
did not know they were using the name; that he  
the transaction between appellant and the appellee  
the latter had left the mill. That appellee  
in the correspondence connected with the sale of the  
question to appellant as plain and to that he did not  
it is also clear that it was used by the appellee  
knowledge or consent and against the express intention  
its manager. There is no evidence even  
does it appear to be obtained by appellee  
authorized to act as agents of appellee  
any way knew or profited by the transaction  
Zimmer brothers are shown by the proofs to have been  
liable to appellants for the amount claimed and  
seeking to bind appellee in the transaction  
nothing to be because the parties who are liable to  
damages used appellee's corporate name in carrying  
transaction with which this suit is connected.  
The uncontradicted evidence shows that appellee  
the Zimmer brothers to use the corporate name  
agent, and the proofs also tend to establish  
of appellee which could lead to the belief  
Zimmer brothers were acting as the agents of  
to believe that the appellee was not

A mere showing that one assumes to act as agent is not sufficient to establish an agency. Nor can the agency be proved by the act of the supposed agent neither expressly nor impliedly authorized by the alleged principal. *Platt & Co. v. Ballou* 131 Ill. App. 564.

Where one attempts to take advantage of the act of a claimed agent, the burden is upon him to show the authority to that agent. *Jackson Paper Co. v. Commercial Bank* 129 Ill. 161. While appellants may have been misled by the use made by the Zimmers of appellee's corporate name in the transaction in question, yet the proofs fail to show any act of commission or omission on the part of appellee which should or does render it liable to appellant growing out of its transaction with the Zimmers upon which this suit is based.

The Judgment of the court below will be affirmed.

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(Not to be reported in full).

A mere showing that one agrees to act as agent is not

sufficient to establish an agency. Nor can the agent

proved by the act of the supposed agent without express

or impliedly authorized by the alleged principal. *Id.*

2 Co. v. Bailey 131 Ill. App. 644.

Where one attempts to take advantage of the act of

another agent, the burden is upon him to show the authority

to that agent. Jackson v. Co. v. Commercial and Ind. 131

Ill. While appellants may have been misled by the use made

by the directors of appellee's corporate name in the transaction

in question, yet the facts fail to show any act of concealment

or omission on the part of appellee which should have been

rendered it liable to appellant growing out of the transaction.

With the elements upon which this suit is based.

The judgment of the court below will be affirmed.

\*\*\*\*\*

(Not to be reported in full).



I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28<sup>th</sup> day of July, A. D. 1911.

*A. C. Millspaugh*  
Clerk of the Appellate Court.

# OPINION

Fee \$

1285 7/231

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff

And afterwards in Vacation, after said March term, to-wit: On the 27th day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Laxon Est.  
Kimmel, Executor

~~ERROR TO~~  
APPEAL FROM

188 I.A. 285

No. 16

vs.

Circuit

COURT

March Term, 1914.

Perry

COUNTY

Stafford

TRIAL JUDGE

Hon. W. E. Hawley



Term No. 16.

Agenda No. 17.

March Term A.D. 1914.

Ella Stafford,

Appellee

V.

H.E. Kimmel, Executor, etc.)

Appellant.

Appeal from Army.

138 LA 285

Opinion by Higbee, J.J.

Appellee was allowed \$750 as a claim against the estate of Matthew Laxon, deceased for services rendered as housekeeper and nurse. H.E. Kimmel, executor, appealed to the circuit court from the order of the court allowing the claim, but filed no appeal bond. A writ of habeas corpus was filed and the case docketed in the circuit court where appellee made a motion to dismiss the appeal for want of appeal bond, which was sustained by the court and the appeal dismissed.

The circumstances connected with the proceedings in the circuit court upon the dismissal of the appeal, are identical with those which are involved in the case of H.E. Kimmel, executor, etc., where a similar claim was rendered deceased, was filed and wherein an opinion was filed to the present term of this court. As stated in said opinion, the judgment of the court should be affirmed in this case.

Affirmed.

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(Not to be published in full)

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1. 19. 10. 1941. [5. 11. 1941]

• JABLOVA

... ..

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

to be a part of the same group. The group is not a part of the same group.

McNeessee and Hase. U.S. Travel, excursions, etc.

appeal to the circuit court from the order of the

... have been on both the main and outfalls

... und so weiter, bis er die ...

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The circumstances connected with the

Official Court Report Noted

with those which are involved in "the case".

H. S. Pittman, Jr., President, American Bar Association

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Filed to the present time. This is true.

... something like it before

ed 11/11/55

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th day of July A. D. 1914

A. C. Millspaugh  
Clerk of the Appellate Court

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# OPINION

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Free \$

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7287

~~7283~~

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff

And afterwards in Vacation, after said March term, to-wit: On the 27 day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

McClellan

ERROR TO  
APPEAL FROM

188 I.A. 291

No. 20 vs.

City

COURT

March Term, 1914.

E. H. Louis

COUNTY

E. H. Louis Sight  
& Power Co.

TRIAL JUDGE

Hon. H. M. Vandewater



Term No. 20.

Agent No. 40.

March Term, A. D. 1914.

Thomas C. McAleeman,

Appellee,

v.

East St. Louis Light and Power Company,

Appellant.)

Appeal from City Court  
Of East St. Louis.

1881.4 291

Opinion by Higbee, P.J.

In this suit appellee, Thomas C. McAleeman, claims that his horse was frightened and caused to run away by the carelessness of the servants of the East St. Louis Light and Power Company, appellant, resulting in injuries to the horse of such a nature as to render it necessary that it be killed and the wagon and harness. The amended declaration filed in the case was tried, charged that one of appellant's servants, carelessly, negligently and improperly, threw a certain rope which he then and there held coiled in his hand, to or near a servant, who was then on a telegraph or telephone pole, standing within a short distance from where the horse of appellee was tied, in such a manner as to frighten and scare the horse and cause it to break his halter and run away. There was a verdict of not guilty and a verdict in favor of appellee, for \$300. A remittitur was entered by appellee and judgment was entered given for \$213.60. Some days later the judgment was vacated and appellee given leave to file an additional count to the declaration. In the meantime an appeal had been prayed from the judgment and an appeal bond filed. Appellee instead of

March term, A. D. 1914.

Thomas C. McAlisterman,

Appellee,

v.

East St. Louis Light and  
Power Company.  
Appellant.

Opinion by Hibbs, J.

In this suit appellee, Thomas C. McAlisterman, claiming that his horse was frightened and caused to run away by the carelessness of the servants of the East St. Louis Light and Power Company, appellant, resulting in injuries to the horse of a nature as to render it necessary that it be killed in order to save the wagon and harness. The amended declaration in the case was tried, charged that one of appellant's servants, carelessly, negligently and improperly, threw a certain rope which he then and there held coiled in his hand, to another servant, who was then on a telegraph or telephone pole, within a short distance from where the horse of appellee was tied, in such a manner as to frighten and scare the horse, cause it to break his halter and run away. Thereupon appellee, of not guilty and a verdict in favor of appellee, was entered. Remittitur was entered by appellee and judgment was affirmed given for \$212.60. Some days later the judgment was reversed and appellee given leave to file an additional count to the complaint. In the meantime an appeal had been prayed for and judgment and an appeal bond filed.

an additional count to the declaration in accordance with the leave given him, filed a complete amended declaration. He then again entered the remittitur and judgment was a second time entered for \$213.60 and an appeal allowed. Counsel for appellant state that the second amended declaration was filed in their absence and that they were given no opportunity to plead to the same. The last amended declaration filed, omitted the allegations of negligence above set forth in the former declaration and in lieu thereof charged, that on August 8, 1917, appellee securely fastened his horse to a hitching post on the easterly side of Collinsville Avenue in the city of St. Louis, Illinois: that while said horse was so hitched and fastened, a servant of defendant engaged in its business, climbed a certain telephone, telegraph or electric light pole standing in front of and within a short distance from where the horse was tied, with a certain rope, one end of which was attached to or held by the said servant, and while said servant was on said pole he carelessly, negligently, and improperly dropped or threw the end of said rope to the ground while the horse was still holding to the other end of the same; that said horse so suspended, dangled and moved in a vibrator, manner and in front of said horse so as to frighten and startle the horse cause it to break loose and run away.

Waiving the question as to whether the trial court properly exercised its discretion in permitting the amended declaration to be filed in the absence of counsel for appellant and after the appeal bond had been filed, we will treat this appeal as though the amendment had been filed in the usual manner upon the trial. When the last amended declaration was filed, the charges contained in the previous declaration were abandoned and the case must stand on the charges in the

[illegible]

contained in the last declaration. There can be no declaration in the case and when appellee filed his first amended declaration he abandoned his former declaration, and the last declaration could not be aided by anything said in the former. Foster v Adler 64 Ill.App.654. Joins v Fowler 133 Id. 36.

The proffs show appellant has a line of electric light poles along the east side of Collinsville Avenue in East St. Louis. One of these poles is located at the edge of the sidewalk opposite what is known as the Peoples Store and five to eight feet south of this pole was an iron hitching post. On the morning of August 9th, 1913, appellee tied his horse by a strap halter to the post and went away to attend to some business matters. The horse faced north towards the post in question and was hitched to a spring wagon. At 11 o'clock, some thirty minutes after appellee had left his horse, appellant's line crew, consisting of three men, got up in a line wagon, carrying tools and materials and drove some forty feet north of the pole on the opposite side of the street from the horse. The crew came there to attach an electric wire at the top of the pole and run one therefrom across the sidewalk into the Peoples Store. Appellant claims that the respective duties were as follows: One member was to climb the pole and make the connection, another to bore a hole in the brick building and prepare for a bracket to be placed there to hold the wire as it entered the building and the third to stand at the wagon and make the bracket, and on the trial the three men testified to having been so engaged at the time the horse broke loose and ran away. Appellee was not present at the time and had to rely upon the testimony of others to establish

contained in the last declaration. There was no declaration in the case and when appellant filed the amended declaration he abandoned the former declaration and the last declaration could not be relied upon and in the former. Foster v. Baker, 111 Ky. 444, 100 S.W. 133 14, 28.

The profits show appellant has a line of electric lights along the east side of Louisville Avenue in West Louisville. One of these poles is located at the edge of sidewalk opposite what is known as the business there and five to eight feet south of this pole was an iron hitch post. On the morning of August 24th, 1913, appellant the horse by a strap halter to the post and went away to attend some business matters. The horse faced north towards the post in question and was hitched to a spring wagon. At 11 o'clock, some thirty minutes after appellant had left the horse, appellant's line crew, consisting of three men, drove up in a line wagon, carrying tools and materials and stopped some forty feet north of the pole on the opposite side of it from the horse. The crew came there to attach an electric wire at the top of the pole and run one therefrom across the sidewalk into the Peoples Store. Appellant claims that the respective duties were as follows: One member was to climb the pole and make the connection, another to bore a hole in the brick building and prepare for a bracket to be placed there to hold the wire as it entered the building and the other to run at the wagon and make the bracket, and on the trial the three men testified to having been so engaged at the time the horse broke loose and ran away. Appellant was not present at that time and had to rely upon the testimony of others to sustain



his case. His principal witness, [redacted], testified that he went across the street [redacted] where the horse was tied to a saloon to get [redacted] as he came back he saw one of appellant's servants [redacted] the ground coiling up a line of rope and throwing [redacted] man on the pole; as the man did that the horse [redacted] broke loose and swung right around in the street on [redacted] Collinsville Avenue; that the man to whom the rope was [redacted] was up at the arms of the pole 18 or 20 feet from the [redacted] and he caught the end of it and the rope dangled down in [redacted] of the horse; that the thing that started the horse [redacted] on the ground throwing the rope up there; that he [redacted] horse.

John H. Smith, another witness who was some [redacted] saw the horse break loose, but did not see the man on the ground throw the rope. He stated he did see the man on the telegraph pole taking off some wire from the reel; that he [redacted] not see what caused the horse to break loose, but the [redacted] rope dangling down from the pole about two minutes [redacted] horse had started to go. The three employees [redacted] swore that no one of their crew threw a rope to the [redacted] the pole; that before ascending the pole the man [redacted] at work at that place, fastened one end of the rope to [redacted] and left the coil on the sidewalk and then went up the [redacted] 18 or 20 feet; that part of the rope was in the coil [redacted] sidewalk and the rest was at the side of the pole [redacted] to where it was attached to the man at work there. The [redacted] was on the pole, Ohlendorf, stated, that he had not [redacted] ready to work, that he had just reached the cross arm [redacted] strapping his safety appliance to it, and [redacted] in position for work, when he saw the horse [redacted]



down the street.

The witnesses on the part of appellant testified that they did not know what scared the horse. It will thus appear that there was no proof whatever tending to sustain the charge of the last amended declaration, that the appellant dropped or threw the end of the rope to the ground near the horse, thereby causing him to run away and the verdict and judgment based upon the proof which was introduced, cannot be sustained. We may also state that in our opinion the weight of the evidence was clearly in favor of defendant on the allegations contained in the first amended declaration, upon which the case was really tried. The judgment in this case will be reversed and the cause remanded.

Reversed and remanded.

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(Not to be reported in full)

down the street.

The witness on the part of the defendant

they did not know that he was the person.

that there was no proof whatever to show

charge of the last alleged feeling, that

of appeal on the sole evidence, registered

dropped or threw the end of the rope to

the horse, thereby causing him to run away

and judgment based upon the fact which was taken

be sustained. We may also state that in our opinion

weight of the evidence was clearly in favor of the

the allegations contained in the first report.

upon which the case was really tried. The judgment

case will be reversed and the case remanded.

granted the motion.

4-11-1913

(Not to be reported in full)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court  
at Mt. Vernon, this 28th day of July,  
A. D. 1914.

Clerk of the Appellate Court

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# OPINION

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*Fee \$*

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1210 7-2-36

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff

And afterwards in Vacation, after said March term, to-wit: On the 27<sup>th</sup> day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Maddell

~~ERROR TO~~  
APPEAL FROM

188 I.A. 302

vs.

Circuit

COURT

No.

34

March Term, 1914.

Randolph

COUNTY

Noser

TRIAL JUDGE

Hon.

Geo. A. Cron





March Term, A. D. 1914.

Robert A. Waddell,

Appellee,

vs.

John A. Noser,

Appellant.

Appeal from Randolph.

103-302

Opinion by Higbee, P.J.

This was a suit brought by Robert A. Waddell, appellee, to recover a broker's commission for the sale of real estate owned by appellant. The declaration was composed of two of the common counts, one for money laid out and expended and the other for work, labor and services rendered by appellee in and about effecting a sale of said property. There was a plea of general issue and a judgment upon the verdict of the jury for \$329.00. Appellant insists the judgment should not be permitted to stand on account of prejudicial error committed by the court in excluding certain evidence and in instructing the jury.

The proofs show that appellant owned a flouring mill and some vacant real estate at Rockwood, Illinois, and desiring to exchange it for other property, employed appellee to find in a satisfactory exchange. Appellee who did business in St. Louis sent for appellant and introduced him to a Mr. Rowden, who had three houses in that city he was willing to exchange for the property. After appellant inspected the houses he and Rowden went to Rockwood so that the latter could look over appellant's property. Rowden then informed appellant that his houses in St. Louis were covered by mortgages and further negotiations were thereupon discontinued and Rowden went to the railroad station to take a train back to St. Louis. Before Rowden could

March Term, A. D. 1914.

Appeal from Judgment.

Robert A. Waddell,  
Appellee,  
vs.  
John A. Rowden,  
Appellant.

302

Opinion by Higbee, J. 1.

This was a suit brought by Robert A. Waddell, appellee, to recover a broker's commission for the sale of real estate owned by appellant. The declaration was composed of two of common counts, one for money laid out and expended and the other for work, labor and services rendered by appellee in and about effecting a sale of said property. There was a plea of general issue and a judgment upon the verdict of the jury for \$329.00. Appellant insists the judgment should not be sustained to stand on account of prejudicial error committed by the court in excluding certain evidence and in instructing the jury. The proofs show that appellant owned a farming mill and some vacant real estate at Rockwood, Illinois, and desired to exchange it for other property, employed appellee to find him a satisfactory exchange. Appellee who did business in St. Louis sent for appellant and introduced him to a Mr. Rowden, who had three houses in that city he was willing to exchange for the property. After appellant inspected the houses he and Rowden went to Rockwood so that the latter could look over appellant's property. Rowden then informed appellant that his houses in St. Louis were covered by mortgages and further negotiated a sale thereupon discontinued and Rowden went to the railroad station to take a train back to St. Louis. Before appellant could

get a train, appellant went to the station and made a contract with him to trade his mill for one of the St. Louis houses. Rowden took the mill at a valuation of \$6,700.00, and in payment therefor appellant took one of the St. Louis houses valued at \$9,000.00, subject to an incumbrance of \$3,800.00 leaving an equity therein of \$5,200.00, and a mortgage back on the mill for \$1,500.00, making in all \$6,700.00.

Appellant contends that his agreement with appellee was to pay \$500.00 commission if appellee would procure \$10,000.00 in cash for his property or would get for him in exchange St. Louis property, which would bring him an income of ten per cent. annually on that amount, while appellee swore that appellant promised to give him five per cent on the dollar on any trade or sale he should make for the mill at Rockwood or his whole property. The amount of the judgment was five per cent of the valuation of the equity of the St. Louis property, \$6,700.00, less a payment of \$6.00 for which appellee gave appellant credit. Certain letters of appellant and the testimony of certain witnesses introduced on behalf of appellee, which tended to support his claim that he was to have five per cent commission for effecting the sale or exchange of appellant's property, would justify a jury in finding that such was the contract. The theory of the defense is first, that appellee did not fulfil his contract to find appellant a buyer or a trade for the amount of consideration agreed upon; second, that the original negotiations were abandoned and a new trade consummated entirely different from the original for which appellee was not entitled to any commission, because he was not the efficient cause of the consummation of the same; and third, that as appellee had not carried out the special contract between the parties, he was

Get a train, appellant went to the station and made a contract with him to trade his mill for one of the St. Louis houses. Rowden took the mill at a valuation of \$6,700.00, and in payment therefor appellant took one of the St. Louis houses valued at \$9,000.00, subject to an incumbrance of \$3,800.00 leaving an equity therein of \$5,200.00, and a mortgage back on the mill for \$1,500.00, making in all \$6,700.00.

Appellant contends that his agreement with appellee was to pay \$500.00 commission if appellee would procure \$10,000.00 in cash for his property or would get for him in exchange St. Louis property, which would bring him an income of ten per cent annually on that amount, while appellee swore that appellant promised to give him five per cent on the dollar on any trade or sale he should make for the mill at Rockwood or his whole property. The amount of the judgment was five per cent of the valuation of the equity of the St. Louis property, \$6,700.00, less a payment of \$6.00 for which appellee gave appellant credit. Certain letters of appellant and the testimony of certain witnesses introduced on behalf of appellee, which tended to support his claim that he was to have five per cent commission for effecting the sale or exchange of appellant's property, would justify a jury in finding that such was the contract. The theory of the defense is first, that appellee did not initiate his contract to find appellant a buyer or a trade for the mill of consideration agreed upon; second, that the original negotiations were abandoned and a new trade consummated entirely different from the original for which appellee was not entitled to any commission, because he was not the efficient cause of the consummation of the same; and third, that as appellee had not carried out the special contract between the parties, he was

entitled only to what his services were reasonably worth under a quantum meruit.

Upon the trial the court refused to permit evidence offered by appellant, concerning the actual value of the St. Louis property given in exchange for the Rockwood mill and also refused an instruction tendered by appellant, which told the jury that if they believed from the evidence the contract for the sale or exchange of the property between Noser and Rowden was wholly different from that contemplated by the contract between Waddell and Noser, then Waddell was not entitled to recover the commissions on the contract as originally made. The theory of this instruction appears to have been that appellee, if entitled to recover at all, could recover only on a quantum meruit for his services. Whether or not the court properly excluded evidence concerning the actual value of the St. Louis property, depends upon whether the commission, if any, which appellee was entitled to recover, should be calculated upon the value placed upon that property by the parties to the trade or upon the value ~~placed~~ it might be proved to be worth upon the trial. We are inclined to think that for the purpose of calculating the commission, the property must be assumed to be worth the value placed upon it by both parties to the trade at the time the contract was consummated. Had appellant's property been sold for cash there can be no question but that if appellee was entitled to a commission, it would have been at the rate of five per cent upon the amount of the sale, and then appellant instead of cash, received property in exchange which he, as well as the owner thereof, valued in making the trade at a certain amount, he, for the purpose of estimating commissions,

entitled only to what his services were reasonably worth as a quantum meruit.

Upon the trial the court refused to permit evidence to be offered by appellant, concerning the actual value of the property given in exchange for the Rockwood mill and also refused an instruction tendered by appellant, which told the jury that if they believed from the evidence the contract for the sale or exchange of the property between Nosser and Waddell was wholly different from that contemplated by the contract between Waddell and Nosser, then Waddell was not entitled to recover the commissions on the contract as originally made. The theory of this instruction appears to have been that appellee, if entitled to recover at all, could recover only on a quantum meruit for his services. Whether or not the court properly excluded evidence concerning the actual value of the Rockwood property, depends upon whether the commission, if any, which appellee was entitled to recover, should be calculated upon the value placed upon that property by the parties to the trade or upon the value ~~fixing~~ it might be proved to be worth upon the trial. We are inclined to think that for the purpose of calculating the commission, the property must be assumed to be worth the value placed upon it by both parties to the trade at the time the contract was consummated. Had appellant's property been sold for cash there can be no question but that it appellee was entitled to a commission, it would have been at the rate of five per cent upon the amount of the sale, and the appellant instead of cash, received property in exchange which he, as well as the owner thereof, valued in making the trade at a certain amount, he, for the purpose of estimating compensation,

must be bound by the valuation he as well as the owner, fixed upon the property received by him.

Appellee did not seek to recover on a quantum meruit for his services but relied upon his express contract with appellant for a percentage commission. While the trade was not consummated in identically the manner contemplated by the contract between appellant and appellee nor according to the original terms talked of by appellee and Rowden, yet it was consummated along the lines talked of and discussed by Rowden with appellant and appellee, and there was no such departure from those lines as to warrant a change in the manner of computing the commission for that intended by the original terms of the employment of appellee to make the sale. Appellant relies on *Close v. Browne*, 230 Ill., 228, which holds, that where the transaction in regard to the sale of the land is wholly different from the one contemplated by the parties when the contract was made, there can be no recovery upon the contract, but that if the principal received the benefit of the agent's services rendered at the instance of the principal, he is liable upon a quantum meruit. But that rule cannot apply to this case as the disposition of the property was not wholly different from that contemplated by the contract between appellant and appellee but on the contrary was directly upon the line indicated by the terms of the employment. We are therefore of opinion that the court properly refused appellant's instruction above referred to.

Complaint is also made of the refusal of instructions 2, 3 and 4 offered by appellant. Refused instruction No. 3 laid down a rule of law to govern the jury in case they found that the negotiations ~~fix~~ for the exchange of the properties of

must be bound by the valuation he as well as the owner, fixed upon the property received by him.

Appellee did not seek to recover an quantum meruit for his services but relied upon his express contract with appellant for a percentage commission. While the trade was not conducted in identically the manner contemplated by the contract between appellant and appellee nor according to the original terms talked of by appellee and Rowden, yet it was conducted along the lines talked of and discussed by Rowden with appellant and appellee, and there was no such departure from those lines as to warrant a change in the manner of computing the commission for that intended by the original terms of the employment of appellee to make the sale. A plaintiff relies on the fact in *v. Browne*, 230 Ill., 328, which holds, that where the transaction in regard to the sale of the land is wholly different from the one contemplated by the parties when the contract was made, there can be no recovery upon the contract, but that if the principal received the benefit of the agent's services rendered at the instance of the principal, he is liable upon a quantum meruit. But that rule cannot apply to this case as the transaction of the property was not wholly different from that contemplated by the contract between appellant and appellee, but on the contrary was directly upon the line indicated by the terms of the employment. We are therefore of opinion that the court properly refused appellant's instruction above referred to.

Complaint is also made of the refusal of instructions 3 and 4 offered by appellant. Refused instruction 3 laid down a rule of law to govern the jury in case they found that the negotiations were for the exchange of the properties of



Noser and Rowden had been abandoned by both parties in good faith. This instruction was improper for the reason that there was no proof of any abandonment of negotiations between said parties. "The mere fact that negotiations may have been discontinued for a short time, will not defeat a recovery. In order to constitute an abandonment the evidence must not only show the breaking off of the negotiations, but also an abandonment of all intention by the purchaser of purchasing the property." *Rasar v. Spurling* 176 Ill. App., 349.

The fourth refused instruction told the jury, that a person employed to make a sale of property is not entitled to commission where he is not the efficient cause of the consummation of the transaction, for which the recovery of commission is sought. This instruction, if given, might have been misleading in this case as tending to cause the jury to believe that plaintiff was not entitled to recover unless he had directly brought about the trade exactly as it was consummated, which is not the law. The theory that before appellee could recover, it had to be shown by the proofs that he brought the defendant and Rowden together and that the result thereof, was the making of the trade in question, was fully covered by other instructions in the case. Upon the whole case we are satisfied that substantial justice has been done and as there are no errors of sufficient materiality to warrant a reversal the judgment will be affirmed.

Affirmed.

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(Not to be published in full.)

More and Rowden had been abandoned by both parties in 1904.

False. This instruction was improper for the reason that there was no proof of any abandonment of negotiations between said parties. "The mere fact that negotiations may have been discontinued for a short time, will not defeat a recovery. In order to constitute an abandonment the evidence must not only show the breaking off of the negotiations, but also an abandonment of all intention by the purchaser of purchasing the property." *Hassan v. Spurling* 176 Ill. App. 349.

The fourth refused instruction told the jury, that a person employed to make a sale of property is not entitled to commission where he is not the efficient cause of the consummation of the transaction, for which the recovery of commission is sought. This instruction, if given, might have been misleading in this case as tending to cause the jury to believe that plaintiff was not entitled to recover unless he had directly brought about the trade exactly as it was consummated, which is not the law. The theory that before appellee could recover, it had to be shown by the proofs that he brought the defendant and Rowden together and that the result thereof, was the making of the trade in question, was fully covered by other instructions in the case. Upon the whole case we are satisfied that substantial justice has been done and as there are no errors or sufficient materiality to warrant a reversal the judgment will be affirmed.

Affirmed.

\*\*\*\*\*

(Not to be published in full.)

*I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.*

*IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court  
at Mt. Vernon, this 26<sup>th</sup> — day of July.  
A. D. 1914.*

*Clerk of the Appellate Court*

# OPINION

*Fee \$*

1272

11-310

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff

And afterwards in Vacation, after said March term, to-wit: On the 28th day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

*Jeffries*

**ERROR TO  
APPEAL FROM**

188 I.A. 310

No. 40

vs.

*Piercub*

COURT

March Term, 1914.

*Marion*

COUNTY

*Alexander*

*et al*

TRIAL JUDGE

Hon. *J. C. McBride*



Term No. 40.

March Term A.D. 1914.

March Term A.D. 1914.

Ida Jefferies,

Appellee,

v.

Appeal from Marion.

A. J. Alexander, et al.

Appellants.

188 L.A. 310

Opinion by Higbee, P.J.

This was a suit under the dram shop act brought by Ida Jefferies, appellee, to recover damages on account of the death of her husband, against A.J. Alexander, L.D. Yarnier, Edward E. Kell and August Langenfeld, appellants, and several others who were either found not guilty or dismissed out of the suit.

The declaration contained two counts, the first of which set out the marriage of appellee to Newton Jefferies, August 22, 1908 and alleged that at that time he was working for the Marion County Coal Company, for \$50 a month and was also receiving an income in the nature of a life estate, amounting to \$37 a month; that by reason of the amount so received by him he was enabled to and did provide a comfortable and liberal maintenance for himself and plaintiff; that commencing about December 1, 1908 and on divers days and times from thence until the death of said Newton Jefferies, on February 2, 1913, the defendants and each of them from time to time, sold and gave him intoxicating liquors, causing in whole or in part his intoxication; that he thereby became habitually intoxicated and in consequence lost his position, wasted his salary, squandered

Knox Term A. J. 1881.

Appeal from action.

Ida Jeffries,  
Appellee,  
v.  
A. J. Alexander, et al,  
Appellants.

1881. A. 310

Opinion by Gibbs, P. J.

This was a suit under the dram shop act brought by  
Ida Jeffries, appellee, to recover damages on account of the  
death of her husband, against A. J. Alexander, et al, appellants.  
Edward H. Bell and August Langensfeld, appellees, and others  
others who were either found not guilty or dismissed out of  
the suit.

The declaration contained two counts, the first of which  
set out the marriage of appellee to Newton Jeffries, a  
22, 1908 and alleged that at that time he was in the  
Marion County Jail (County, for 30 months and was  
receiving an income in the nature of a life estate, amounting  
to \$37 a month; that by reason of the amount so received  
he was enabled to and did provide a comfortable and  
maintenance for himself and plaintiff; that commencing  
December 1, 1908 and on various days and times from that date  
the death of said Newton Jeffries, on February 2, 1909,  
defendants and each of them from a to it of said  
him intoxicating liquors, causing in whole or in part  
intoxication; that he thereby became liable for the  
in consequence lost his position, and the value of the



ed his money and property, became greatly impoverished, and was degraded and wholly ruined in body and mind, and by reason thereof ceased to exercise or attend to his duties or business or to earn or provide a livelihood for himself or plaintiff; that he became continuously intoxicated and afflicted with delirium tremens and by reason thereof became ill and afterwards on the day aforesaid, in consequence of such habitual intoxication he died; that appellee served notice upon each of the defendants, they being licensed dram shop keepers, not to sell or give to her husband intoxicating liquors but they persisted in so doing, and by reason thereof, appellee has been deprived of her husband's support.

The second count was similar to the first, except that it alleges the death of said Jefferies was caused by delirium tremens, resulting from intoxication brought about in whole in part by the intoxicating liquor furnished him by the defendants. There was a plea of the general issue and a judgment and verdict in favor of appellee for \$1000.

The record shows fourteen assignments of errors of appellant, which in different ways allege that the proof did not sustain the verdict, that the court erred in its ruling as to the evidence, that an improper instruction was given on behalf of appellee and that one of the counsel for appellee made improper and prejudicial remarks in his address to the jury.

The proofs upon which appellee based her right of recovery were in substance as follows: for two or three years prior to his marriage to appellee, Newton Jefferies, while occasionally indulging in the use of intoxicating liquors, did not do so to excess, and at the time of his marriage he was

ed his money and property, became friendly, and  
degraded and wholly ruined in a very short time,  
of ceased to exercise or attempt to exercise  
earn or provide a livelihood for himself and his  
became continually intoxicated and dissipated,  
tremens and by reason thereof became ill and after a  
day aforesaid, in consequence of such drinking, he  
he died; that a police named William Smith, of the  
they being licensed from the police, not to sell  
husband intoxicating liquors but the defendant in  
by reason thereof, a police has been appointed to  
support.

The second count was similar to the first, and  
alleges the death of said defendant as caused by  
tremens, resulting from intoxication brought about  
in part by the intoxicating liquor furnished to  
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regard to the evidence, that an improper instruction  
on behalf of appellee and that one of the counts of  
made improper and prejudicial remarks in the course  
The proofs upon which appellee was convicted  
recovery were in substance as follows: That  
prior to his marriage to appellee, a woman known  
occasionally indulging in the use of intoxicating  
not so to excess, and at the time of her

a position as weighman for a Coal Mining Company. About that time his foster mother died, having made provision for him in her will for the life use of a small estate which paid him \$37 a month. Two or three months later he began drinking heavily and in January, 1909 lost his position. At that time on until his death he was out of employment and habitually intoxicated. During this time he and his wife were dependant for their livelihood upon the \$37 received each month from the foster mother's estate. It was clearly shown and did not appear to be seriously disputed that at different times he received and drank intoxicating liquors purchased by him from the several appellants. On Tuesday night previous to his death he came home intoxicated. His clothes were dirty, his hat mashed in, he was unable to talk, and was so drunk that his step daughter had to put him <sup>to</sup> bed. He never left the bed after that time and was out of his bed only for a short time on Wednesday. On Thursday he was worse and became delirious. He thought that people were pursuing him and that snakes were trying to get him. He said there was money he wanted to get and kept picking at the mattress and sticking things into his underwear. He tried to get out of his bed and finally, to detain him there, the step daughter got a rope and tied him. He grew suddenly worse and died the following morning.

It is one of the contentions of appellants that there could be no recovery for the reason that the declaration stated that Jefferies died of delirium tremens brought on by his habitual intoxication, but that there was no evidence to show that he died of delirium tremens. There was no evidence tending to show that Jefferies was afflicted with delirium tremens, though it was not positive that he was, and the physician who attended him said so.

1. The first question is whether the defendant is a person of good character and reputation. The evidence shows that the defendant is a person of good character and reputation.

2. The second question is whether the defendant is a person of good character and reputation. The evidence shows that the defendant is a person of good character and reputation.

3. The third question is whether the defendant is a person of good character and reputation. The evidence shows that the defendant is a person of good character and reputation.

4. The fourth question is whether the defendant is a person of good character and reputation. The evidence shows that the defendant is a person of good character and reputation.

5. The fifth question is whether the defendant is a person of good character and reputation. The evidence shows that the defendant is a person of good character and reputation.

6. The sixth question is whether the defendant is a person of good character and reputation. The evidence shows that the defendant is a person of good character and reputation.

7. The seventh question is whether the defendant is a person of good character and reputation. The evidence shows that the defendant is a person of good character and reputation.

8. The eighth question is whether the defendant is a person of good character and reputation. The evidence shows that the defendant is a person of good character and reputation.

9. The ninth question is whether the defendant is a person of good character and reputation. The evidence shows that the defendant is a person of good character and reputation.

10. The tenth question is whether the defendant is a person of good character and reputation. The evidence shows that the defendant is a person of good character and reputation.

erysipelas and that he was unable to say whether he was or was not suffering with delirium tremens. That he was in a highly delirious state and was seeing strange things commonly supposed to attend an attack of delirium tremens is undisputed; that this condition and his subsequent withdrawal from his habitual intoxication, caused in whole or in part by liquor sold him by appellant and that appellee was thereby injured in her means of support, was clearly proven. It is to us that under these conditions, it is not material whether the delirium from which he suffered was properly named in the declaration as delirium tremens or not. The proofs established a case which entitled appellee to recover.

Upon the trial appellant offered in evidence the marriage record of the county of Marion, showing a former marriage of Jefferies prior to the time he married appellee and proof was offered to show that his former wife was still living. A decree of divorce entered in the circuit court of said county, at the April term thereof, 1898 in a suit brought by Jefferies against his former wife, was also offered, but objection was sustained by the court to all the proof offered concerning the former wife and the existence of Jefferies former wife. The decree failed to state that the complainant in that suit, Jefferies, was a resident of Marion county and was offered by appellants for the purpose of showing that the court had jurisdiction and therefore the decree of divorce was void. That the first wife of Jefferies was really his present wife. This evidence was excluded by the trial court on the reason that the decree of divorce could not be collaterally attacked as was sought to be done in this suit and appellants claim that this ruling is an error. To sustain their



appellant relied on Becklenberg, v. Becklenberg, 221 Ill. 111, and Garrett v. Garrett 252 Ill. 313, where the question of the validity of the residence of the complainant in a divorce suit was under consideration. These cases are not in point, for the question there determined was that the jurisdiction of the trial court in a divorce suit might be raised for the first time on appeal or writ of error, although it had not been considered in the trial court. The decrees in these cases were directly attacked in the same cases in which they were entered, and the question of a collateral attack in another suit was not considered. In the case of Cassell v. Joseph 184 Ill. 376, the validity of a deed executed by the administrators of an estate was attacked collaterally for the reason that a decree of the county court directing the administrators to sell the property, failed to show service of process upon certain necessary parties, it being claimed that the county court was therefore without jurisdiction. It is there said "It is well settled that a court of general jurisdiction, acting within the scope of its authority, is presumed to have jurisdiction to render the judgment or decree it pronounces, until the contrary appears.... the principle, that presumptions will be entertained in favor of the jurisdiction of courts of general jurisdiction has been applied to cases where the decree is silent as to the service of process upon the defendants. In Swearingen v. Gulick 61 Ill. 208, we said, 'Where the record of a judgment or decree is relied on collaterally, jurisdiction, although it does not appear or fails to appear in the record'. In Benefield v. Benefield 111, 665, we said 'where a decree is called in question collaterally, as is the case here, it may be regarded as a presumption that in all courts of general jurisdiction nothing is done

applicant relied on *McKinnon v. McKinnon*, 200 Ill. 206, where the question of the validity of the residence of the complainant in a divorce case was under consideration. There cases cited in that case the question their definition was that the husband's trial court in a divorce suit might be set aside on appeal or writ of error, although it had not been done in the trial court. The decision in those cases was not attacked in the same cases in which that question was raised. In the case of *Cassell v. Joseph*, 184 Ill. 375, the question of a collateral attack in another suit was not raised. In the case of *Cassell v. Joseph*, 184 Ill. 375, the court did execute of the administrator an order for the sale of the real estate for the reason that a decree of the court directing the administrator to sell the property was shown service of process upon certain necessary parties, being claimed that the court was therefore validly constituted. It is there said "It is well settled that a General Jurisdiction, acting within the scope of its jurisdiction is presumed to have jurisdiction to render the judgment decreed it pronounced, until the contrary is shown. In principle, that presumption will be extended to the jurisdiction of courts of General Jurisdiction as well as to cases where the decree is silent as to the jurisdiction process upon the defendant. In *McKinnon v. McKinnon*, 200 Ill. 206, we said, 'where the record of a judgment or decree is relied on collaterally, the jurisdiction of the court is presumed to be correct unless the contrary is shown.' In *McKinnon v. McKinnon*, 200 Ill. 206, we said, 'where a decree is relied on collaterally, as in the case here, it may be regarded as valid that in all courts of General Jurisdiction no objection

*jurisdiction of court of General Jurisdiction*  
relied on collaterally, the jurisdiction of the court is presumed to be correct unless the contrary is shown.



to be out of their jurisdiction but that specially, it could be so; but on the contrary, nothing shall be intended within the jurisdiction of an inferior court but that it is expressly alleged. In the case cited it was also held that where the decree was silent as to the jurisdiction of the court over the defendants, in the absence of evidence proving that jurisdiction was not acquired, it would be presumed that the court had jurisdiction ' '.

The decree offered in evidence in this case shows that the complainant had resided in the State of Illinois for a year prior thereto, but as it failed to show what county she resided in, it was therefore silent as to the jurisdiction of the court over the complainant and her cause in that respect, but under the authority above quoted, the decree could not be collaterally attacked; and the court did not err in refusing to admit the decree and the other proof in connection therewith.

Complaint is made by appellants of the giving of the second instruction, which was as follows: "The court instructs the jury that the statutes of this State provide as follows: 'Every husband, wife, child, parent, guardian, employer, or other person, who shall be injured in person or property, or in support, by any intoxicated person, or in consequence of intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons, who shall, by selling, giving, or otherwise furnishing, intoxicating liquors, have caused the intoxication, in whole or in part, of such person or persons, shall be liable, severally and jointly, for all damages sustained, and for expenses incurred, and a married woman shall have the same right to sue for and to control the same and the amount recovered, as a single woman.' The objections to this instruction are as follows: It is not a correct statement of the law, while it purports to be a declaration of the law, it is not a correct statement of the law."

to be out of their jurisdiction but that they  
be so; but on the contrary, within the jurisdiction  
within the jurisdiction of an inferior court but the  
expressly alleged. In the case cited it was alleged  
where the decree was silent as to the jurisdiction  
over the defendant, in the absence of evidence showing  
jurisdiction was not required, it would be difficult to  
the court had jurisdiction. 7.

The decree offered in evidence in this case  
the complaint had reached the state of New York  
year prior thereto, but as it failed to show when it  
resided in, it was therefore silent as to the jurisdiction  
the court over the complaint as heretofore stated in  
but under the authority above cited, the law as now  
collaterally attacked; and the court did not say that it  
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Complaint is made by respondents of the jurisdiction of the  
second instruction, which was as follows: "The court is to  
the jury that the statutes of this state require that  
'Every husband, wife, child, parent, guardian, executor or administrator  
person, who shall be injured in person or property by the act or  
support, by an intoxicated person, or the consequences of  
intoxication, habitual or otherwise, and any person who  
a right of action in his or her own name, and to the extent of  
against any person or persons, who, by selling, giving, or  
intoxicating liquors, have caused the intoxication of such person  
in part, of such person or persons, shall be liable to such person  
and jointly, for all damages sustained, and the court is to  
and a married woman shall have the same right to sue  
to control the same and the amount recovered shall be paid  
The provisions of this statute shall be construed to be  
while it is in force, and the court is to give it effect  
-2-

the same in full; that it is an abstract proposition of law, containing no reference to the case or evidence, and does not require proof of facts which would create liability. The instruction appears to us to state all of the statute that is applicable to this case and the portions left out were ~~permissible~~ here and could not have aided in informing the jury as to the law which should govern them in reaching a verdict. Appellants refer to the case of Hapenny v. Hufferman, recently decided by the Appellate Court of the Third District of this state at its October term and not yet reported, where it is claimed that a similar instruction was held to be reversible error. It appears however that the instruction criticised in that case omitted a material part of the statute which is included in the instruction in the case we have under consideration and therefore the same objection would not apply. It is said in that opinion, "The instruction as given is misleading since it tells the jury appellee was entitled to recover all damages sustained and is not limited to damages sustained to her means of support;.....The giving of this abstract instruction was reversible error when the record shows no instruction was given limiting the damages to the loss of her means of support or informing the jury what was the proper measure of damages in the case." Numerous instructions in the case before us limit the damages to injury sustained by appellee in her means of support, and appellee's instruction No. 12 in particular, clearly defined the measure of damages and limited the same to injury to appellee's means of support, so that the criticism referred to as applicable to the instruction in the above case does not apply to the instruction in this

the case in full; that it is an "abstract proposition" containing no reference to the case or parties involved; not requiring proof of facts which would be applicable to this case and the parties before the court; here and could not have aided in identifying the facts which should govern them in reaching a verdict. It is referred to the case of *Hagerman v. Hagerman*, 100 Cal. 111, 33 P. 2d 111, the Appellate Court of the "Third District" of the State. Its October term and not at present, were at issue. That a similar instruction was held to be erroneous in *It* appears however that the instruction criticized in this case omitted a material part of the statute which is in the instruction in the case we have under consideration and therefore the same objection could not be made. It is said in that opinion, "The instruction as given is substantially since it tells the jury appellant was entitled to damages sustained and is not limited to damages sustained to her losses of property." The issue of this objection is that instruction was reversible error when the record shows that instruction was given that the damages to the plaintiff by her means of support or otherwise the jury what was the measure of damages in the case." Numerous instructions in case before us limit the damages to injury sustained by appellee in her means of support, and appellee's instruction No. 12 in particular, clearly limited the measure of damages and limited the same to injury to appellee's means of support so that the criticism referred to as applicable to the instruction in the above case does not apply to the instruction in

The jury could not have been misled by this instruction and the court did not err in giving it.

It is further claimed by appellants that an instruction for appellee made improper and prejudicial remarks in his argument to the jury. It is difficult to learn from the record whether objections were made in apt time to the remarks made of and whether proper exceptions were preserved to the remarks of the court thereon. But at any rate the remarks, which were called for and in a measure improper, were not of such importance as to warrant a reversal of the judgment.

The judgment of the court below will be affirmed.

\*\*\*\*\* Affirmed.

(Not to be reported in full)

Mc Bride J. having tried this case in the court below took no part here.

The jury could not have been misled by this statement.

and the court did not err in giving it.

It is further claimed by appellants that an statement

for appellee made improper and prejudicial remarks in his

argument to the jury. It is difficult to learn from the

whether objections were made in due time to the remarks

of and whether proper exceptions were reserved to the

of the court thereon. But at any rate the remarks

called for and in a measure improper, were not

importance as to warrant a reversal of the judgment.

The judgment of the court below will be affirmed.

Reversed.

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(Not to be reported in full)

No side A. having tried this case in the court below

took no part here.

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28<sup>th</sup> — — day of July, A. D. 1914

*A. C. Millspaugh*  
Clerk of the Appellate Court

# OPINION

*Fee \$*



7-237

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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff

And afterwards in Vacation, after said March term, to-wit: On the 23<sup>rd</sup> day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Hahn

ERROR TO  
APPEAL FROM

188 I.A. 312

vs.

No. 43

Circuit COURT

March Term, 1911.

Clinton COUNTY

Schnell

TRIAL JUDGE

Hon.

A. M. Rose



Term No. 45.

March Term A.D. 1914.

Charles J. Hahn,

Appellee.

V.

Appeal from Circuit Court.

Pauline Schnell,

Appellant.

1281 A. 312

Opinion by Higbee, P.J.

The declaration in this suit was in trespass and Carlisle Schnell and Pauline Schnell with turning on the door of house of appellee Charles J. Hahn and into the open door and windows thereof a large stream of water, with great force and violence, thereby injuring appellee, disturbing his peace of mind and damaging his property. There was a plea of not guilty and a verdict in favor of appellee for \$900, together with judgment for a like amount. From this judgment Pauline Schnell alone appeals, claiming that the proofs failed to establish in any way connected with the offence complained of, there was manifest error in Appellee's third given instruction, the courts ruling in regard to certain evidence, that the defendant Carlisle Schnell was guilty of the offence charged, was not denied, but upon the question whether appellee's mother, was also guilty, there was a sharp conflict of evidence.

The proofs produced on the trial show that Pauline Schnell formerly and for many years lived in the city of Chicago, and that she owned & had used and lot in that city, and that

Arch. 10. 10.

Charles J. Smith,

Appellee.

v.

Appellant from District.

Pauline Johnson,

Appellant.

1931 1931

Opinion by Gibson, J.

The defendant in this case was a woman named

Pauline Johnson, who lived with her husband

at the residence of the defendant, and who was

found there on the day of the murder, with

violence, thereby creating a presumption

of guilt. There is no other evidence

and a verdict in favor of the defendant

judgment for a fine amount. From this judgment

alone appeals, claiming that the verdict was

in any way connected with the offense charged

was manifest error in the trial court's

the courts ruling in regard to certain evidence

and that the defendant was guilty of the offense

not denied, but upon the question of the

his mother, was also guilty, there was a sharp

evidence.

The facts produced on the trial were that

merely and for many years lived in the city of

and that she owned a house and lot at the

the last thirteen years she lived in St. Louis, Missouri, assisting Carlyle from time to time; that in 1905 or 1906 she rented her house in Carlyle to appellee. There was no trouble between the parties to the lease until about the first of the year 1911, when appellee in paying his rent, deducted \$2.00 therefrom on account of repairs. Carlyle Schnell, the son, who appears to have been attending to the business for his mother refused to accept the amount proposed to be paid by appellee and caused suit to be brought in forcible detainer before a justice of the peace for possession of the property. Appellee did not appear before the justice of the peace and judgment was entered against him. He however, appealed the case to the circuit court and afterwards, in June, 1911, while the case was pending, the matter was adjusted by appellant accepting the amount tendered. The lease was then continued as before, appellee paying his rent quarterly by special delivery letter. There appears to have been no further difficulty between the parties until the night of June 26, 1912. About a month before this appellant had come from St. Louis to Carlyle and, as was her custom stopped at the Truesdail Hotel, which was at the northeast corner of the court house square. The premises rented to appellee were some six or seven blocks west of the northwest corner of the square. The day previous to this date Carlyle Schnell, who lived somewhere in Missouri, came to Carlyle and on the night in question, had a conversation with Louis and Tom Thalls about a little job he wanted done. He said that Schnell "was talking about giving Mr. Bahrn a little scare or something about going up there. Said he wanted a little job he wanted done". They went into a saloon in

The first thing I saw when I stepped out of the car was a man in a dark suit and a light-colored shirt. He was standing in the middle of the street, looking towards the car. I got out of the car and walked towards him. He looked at me and then turned and walked away. I followed him for a short distance, but he disappeared into a crowd of people. I then walked back to the car and got in. I drove away from the scene, but I was still thinking about the man in the suit. I didn't know who he was, but I felt like I had seen him before. I tried to remember where I had seen him, but I couldn't. I then drove home and parked the car in the garage. I went inside the house and looked at the clock. It was 11:00 PM. I then went to bed and fell asleep.

Johnell treated to drinks with beer and soda and he also had two pint bottles of whiskey which he afterwards drank. It was agreed by Johnell and Thalls that they would "take the chance" of carrying out Johnell's intention.

On this night Appellor occupied the same room and two small children, he sleeping in the north room second floor, while she and the children slept in the south room. The night was warm and the family had retired past ten o'clock, leaving the windows open. About thirty minutes later the three men went to the city house, secured a hose which they took for some distance and then to a city hydrant diagonally across the street from where Hahn resided. Johnell and Thalls took the other end of the hose across into the Hahn yard and then notified Hahn to turn on the water, which he did. The man in charge of the hose then directed it towards the window of Hahn's room and a stream of dirty water was thrown through the window into the room drenching Mrs. Hahn and the children, greatly damaging the contents of the room. Mrs. Hahn ran into her husband's room and the two men carried the hose to the front of the house and began throwing the stream into that room. Perceiving where the water was coming, Hahn ran into his room, got a revolver and fired three shots towards them, which struck Thalls in the ankle, inflicting a severe wound which he died the following day.

That an atrocious and inexcusable offense was committed by the three men against the public laws and the rights of Hahn and his family, is freely admitted by all concerned. The guilt of the three men is not here in dispute, and the question on the facts which arises here is left to the

tion.

On this night appeared... and the wall... second floor... room. The night was... past ten o'clock... a little later the... covered a... to a city... where... the... the... charge of the... beam's room... window into... greatly... into... the house and... receiving... room... which... he die the following day.

That an... by the three men... and his family... guilt of the... question on the...



showed that appellant Pauline Schnell advised her mother in the outrage perpetrated by her son and his two companions. That she did so is denied by her and her son and her position if such there was, could only be determined from a full and complete consideration of the circumstances:

After the assault was agreed upon by all three men, they all told the other two he wanted to go to her home, that they then went to the hotel and returned to their quarters within a few minutes. It is admitted by both the mother and son that they did go to her at that time and request her to go up to the house that evening, but both state he did not tell her of the offense contemplated. He testified that he did not want to see some trouble there and wanted her to go out there in case she might help him if he was hurt, if he was wounded or anything of that kind. While she state that he requested her to go up to the house, but gave no information as to what he desired her to go there for. As to her movements thereafter, the following evidence was introduced:

Dr. Dieterich testified that he saw her at about 10:15 on the street at 10:15, that he had a talk with her, that he did not know if he had seen Carlyle her son; that she then went to the Truesdail Hotel; that he saw her again about evening, about half an hour later about the same place going north, a short distance and then west, that she was alone, and also saw her come back at about 11 o'clock and go to her hotel; that he was standing in front of the hotel when she came back. The city marshal testified he saw her at the southeast corner of court house square, going towards the Talm residence at about 11 minutes of eleven o'clock; that he asked her if she was

showed that defendant Carlisle was in the  
the car, being driven by her son and that  
That she did so in order to have her son  
it such there as, could only be determined  
circumstances;

After the grand jury heard of the time  
told the other two he wanted to go  
then went to the hotel and returned to their room  
minutes. It is admitted by both the witnesses  
did go to her at that time and remained in the  
the house that evening, but both state he did not  
the offense committed, he testified that he did not  
see some time in there and stated he did not  
might help him if he was hurt, if he was hurt he would  
of that kind. While she stated that he remained in the  
up to the house, but gave no information as to what he did  
her to go there for. As to her having any information  
introduced the following evidence.

Dr. Hester testified that he saw her on the  
the street at 10:11, that he saw a light-colored car  
ed if he had seen Carlisle there; that she had been  
the Trumbull Hotel; that he saw her going into the  
half an hour later about the same place; that she was  
distance and then went, that she was alone and was  
back at about 11 o'clock and to her hotel; that he was  
ting in front of the hotel and came and saw her  
marshfield testified he saw her at the hotel at about  
court house square, going towards the bank and  
minutes of eleven o'clock; that he called her at

for her son Carlyle, and she said she was not. Mr. Wilcox testified he saw her in the same vicinity at about the same time and later saw her on the north side of the square going east towards the hotel about 12 o'clock. Otto Rink testified to seeing her while she was talking to Mr. Wilcox but he did not know what time it was. R. M. Shoups stated he saw her coming from the direction of the Hahn residence towards the hotel at 11:30 o'clock. Josephine Ruff, who lives southeast of the Hahn residence just across the street, testified that on the evening in question, about 9:30 she saw a woman going across the street in a north westerly direction towards the Hahn residence and that about an hour later she saw her doing about the same thing; that when she saw her she was a few feet from the water plug; that about half an hour after she saw her the second time she heard some one dragging something along the west side of the house and got up and looking out of the window saw three men attaching a hose to the water plug; that the two of them then carried the hose across the street and one stayed at the plug; that the lady she saw the first and second time appeared to be the same person; that she was acquainted with Mrs. McNeill and "this lady was built about like Mrs. McNeill". Josephine Ruff testified in her own behalf that she left the hotel about 10 p.m. and walked to the water plug in question, and about 100 feet beyond; that she then turned and came back to the hotel; that immediately thereafter she met the Marshall and when going back to the hotel saw Mr. Rink and Mr. Wilcox; that at that time she also saw Dr. Dieterich and the other men and asked them if they had seen her boy; that when she reached home from her trip, it could not have been more than a few days.

for her son Carlisle, and she said she was not. She testified he was her son in the same vicinity at about 11:30 a.m. and later saw her on the north side of the street east towards the hotel about 12 o'clock. After that time to seeing her while she was talking to Mr. M. M. Hough, she did not know what time it was. Mr. M. M. Hough stated in his testimony from the direction of the main residence towards the hotel at 11:30 o'clock, Josephine and John lived eastward of the residence just across the street, testified that at 9:30 a.m. in the morning in question, about 9:30 she saw a woman going down the street in a north westerly direction towards the hotel, and that about an hour later she saw her going eastward of the hotel; that when she saw her she was a few feet from the hotel; that about half an hour after she saw her she saw her going westward of the hotel, something along the water line; that she heard some one dragging something along the water line; that she got up and looking out of the window saw a person attaching a hose to the water plug; that the two of them carried the hose across the street and on to the hotel; that the lady saw the first and second men go across the street and be the same person; that she was acquainted with them; and "this lady was built about like Mrs. M. M. Hough." She testified in her own belief that she left the hotel about 11:30 a.m. and walked to the water plug in question, and that she testified beyond; that she then turned and came back to the hotel; that immediately thereafter she met the man and woman going back to the hotel and Mr. M. M. Hough; that at that time she also saw Mr. M. M. Hough and the man and woman; that she also saw them at that time; that when she looked at them it they had been in the hotel; that when she looked at them from her trip, it could not have been more than a few minutes.

past 11 o'clock and that she was not "up there" at any time that night.

While the proof does not positively show that appellant was present at the time the outrage was actually committed, it tends to show she was there at the place where it was committed on two occasions during the evening, one of which was at least very near to the time the offense was committed and the evidence as a whole shows facts from which a very natural inference arises that she knew the offense was contemplated by her son. Under these circumstances it was for the jury to say whether she was present aiding and abetting her son in the commission of the offense or if not present, that she had knowledge that the offense was about to be committed and advised and encouraged or abetted him in the commission of the same, in either of which cases she as well as her son would be liable to appellee for the damages incurred by him.

Appellant lays stress upon errors alleged to have been contained in the third instruction given for appellee. That instruction is as follows: "The court further instructs that if you believe from a preponderance of the evidence in this case that David Shade and Thomas Thalls willfully and unlawfully entered the premises occupied by the plaintiff in the night time, and turned a stream of water from a hose, connected with the city hydrant, upon the dwelling house occupied by the plaintiff and through the open window of said house upon the person of the plaintiff, as charged in the declaration, and if you further believe, from the evidence, that said David Shade and Thomas Thalls were procured or employed to do said unlawful act by the defendant Carlyle Schnell, and that he stood by and aided and abetted them in the perpetration of the same, and if you

past 11 o'clock and that she was not at home at that time that night.

It is the fact that she was not at home at that time that night.

was present at the time the offense was committed. It tends to show she was there at the time and on two occasions during the evening, one of which was at least very near to the time the offense was committed. The evidence as a whole shows facts from which a reasonable inference arises that she knew the offense was committed by her son. Under these circumstances it was for the jury to say whether she was present aiding and abetting him in the commission of the offense or if at present, that she had knowledge that the offense was about to be committed and aided and encouraged or abetted him in the commission of the offense in either of which cases she as well as her son would be liable to be punished for the charges therein by him.

Appellant lays stress upon errors alleged to have been contained in the third instruction, given for appellant's benefit. The instruction is as follows: "The court finds that the evidence is not sufficient to believe from a preponderance of the evidence that David Glade and Thomas Glade willfully and unlawfully entered the premises occupied by the plaintiff in the night time, and turned a stream of water from a tank, connected with the city hydrant, upon the dwelling house occupied by the plaintiff and through the open window of said house upon the person of the plaintiff, as charged in the declaration, and that the defendant, from the evidence, that with intent to injure the plaintiff, procured or employed to be used, and used the same." The instruction is correct and the evidence is sufficient to believe that the defendant, from the evidence, that with intent to injure the plaintiff, procured or employed to be used, and used the same.

believe from the evidence that the defendant, William Shade, was the owner of the dwelling house in question. and that in view of procuring possession of the same or forcing the plaintiff and his family to vacate the dwelling house, and present or stood by and aided, abetted, or encouraged the Carlyle Schnell in the commission of said unlawful acts. you believe from the evidence that the said defendant, when not being present had knowledge of what was about to be done, and had advised, encouraged, aided or abetted the said Carlyle Schnell to attempt to dispossess the plaintiff and to obtain possession of said dwelling house by the commission of the acts done, then both the defendants, Carlyle Schnell and William Shade Schnell, are liable for the unlawful acts of the said Carlyle Shade and Thomas Phalls."

The particular objection made by appellant to this instruction is that it appears to lay stress on the supposed desire on the part of appellant to procure possession of the premises in question by forcing appellee and his family to vacate the same. While there had been trouble between the parties to the leasing prior to this time, there was no positive proof that appellant desired to obtain possession of her said premises from appellee and the portion of the instruction referred to thereto, is somewhat in the nature of an argument rather than a reason why appellant might have desired or been led to aid or encourage her son in his unlawful assault upon appellee and his family and on that account the instruction might have been refused or modified by the court. But regardless of any motive which may or may not have actuated appellant to have aided or encouraged said offense, the instruction correctly states the law.





a rule of law applicable to the case and that the part of it does not appear to us to be sufficient to warrant a reversal of the case on that account.

Appellant also insists that the court erred in refusing to permit Carlyle Schnell, one of the defendants, to introduce evidence to show that he had paid out large sums for fine and court costs in the same suit and that Mrs. Kahn had recovered a judgment against him for \$500.00. This evidence appears to us to have been excluded, as it could not affect the right of this plaintiff to recover against Carlyle Schnell nor the amount of the judgment. But even if that were not the case, it could not be taken to her advantage of here as it did not in any manner conceal the plaintiff's right of action against Mrs. Schnell, who is the only plaintiff. Appellant also complains that the court erred in refusing to give certain of her instructions in regard to exemplary or punitive damages, but we find from an examination of the transcript that they were fully covered so far as proper, by an instruction given to the jury on behalf of Appellant upon the same subject.

The judgment of the court below will be affirmed.

ADD PAGE

◆ ◆ ◆ ◆ ◆

(Not to be reported in full.)

a rule of law which is to the same effect  
part of it is a rule of law which is to the same effect  
to warrant a reversal of the case and to  
Appellant also insists that the court  
to permit the appellee to recover, one of the reasons  
show that he had paid out large sums of money  
same not and that like. He has had recovered  
him for \$100.00. This evidence appears to be  
excluded, as it could not affect the right  
recover against the appellee. He has had recovered  
But even if it were not the case, it could not  
advantage of him as it did not in any way  
right of action against the appellee, who has paid  
Appellant also complains that the court has  
certain of her instructions in regard to damages  
damages, but we find from an examination of the  
this covered as the case proper, and we find  
count on behalf of appellee, and we find  
The judgment of the court is affirmed.

(Not to be reported in full)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court  
at Mt. Vernon, this 28<sup>th</sup> day of July,  
A. D. 1914.

A. C. Millspaugh  
Clerk of the Appellate Court

# OPINION

See, p.

1274

*Opinion of the Appellate Court*

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff

And afterwards in Vacation, after said March term, to-wit: On the 20th day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

ERROR TO  
APPEAL FROM

Ballance

188 I.A. 315

No. 14 vs.

Circuit

COURT

October Term, 1913.

Madison

COUNTY

City of Granite City

TRIAL JUDGE

Hon. W. E. Hadley



Term No. 14.

Agenda No. 49.

October Term, A. D. 1913.

Thomas M. Ballance,

Defendant In Error,

vs.

City of Granite City,

Plaintiff in Error.)

Error to  
Circuit Court of  
Madison County.

188 I.A. 315

Opinion by Harris, J.

The declaration of one count alleged that on the 7th day of November, 1909, plaintiff in error wrongfully permitted the sidewalk on the east side of A Street to be and remain in an unsafe condition for travel; that it permitted the boards, planks, stringers and timbers of said sidewalk to be and remain in a rotten, loose and defective condition; alleged notice to the City; that defendant in error, on the evening of the 7th day of November, 1909, was walking along and over said sidewalk in the exercise of due care and caution, and tripped and fell by reason of the defective condition of the sidewalk. Avers expenditure of \$200.00 in trying to be cured of his injuries, and alleges damages in sum of Ten thousand Dollars. To this declaration plaintiff in error files plea of not guilty. The jury returned a verdict against plaintiff in error for sum of \$2,091.00. Judgment entered on the verdict and this appeal prosecuted.

The error argued for a reversal of this case is <sup>that</sup> the verdict of the jury is manifestly against the weight of the evidence. The defendant in error assumed the burden of proving by a preponderance of the evidence:

That the sidewalk in question was out of repair at the time

October Term, A. D. 1913.

Thomas M. Balfance,

Defendant in Error,

vs.

City of Granite City,

Plaintiff in error.

Circuit Court of  
St. Louis

1913

Opinion by Harris, J.

The declaration of one count alleged that on the 11th day of November, 1908, plaintiff in error wrongfully permitted the sidewalk on the east side of A Street to be and remain in an unsafe condition for travel; that it permitted the boards, planks, stringers and timbers of said sidewalk to be and remain in a rotten, loose and defective condition; alleged notice to the City; that defendant in error, on the evening of the 11th day of November, 1908, was walking along and over said sidewalk in the exercise of due care and caution, and tripped and fell by reason of the defective condition of the sidewalk. Averred expenditure of \$200.00 in trying to be cured of said sidewalk and alleged damages in sum of ten thousand dollars. To the declaration plaintiff in error filed plea of not guilty. The jury returned a verdict against plaintiff in error for \$2,091.00. Judgment entered on the verdict and trial costs prosecuted.

The error argued for a reversal of this case is that of the jury in manifestly against the weight of the evidence. The defendant in error assumed the burden of proving by a preponderance of the evidence:

That the sidewalk in question was out of repair at the time



of the accident and for a sufficient length of time prior thereto that the city had notice thereof, actual or constructive. That the City had notice of the accident as provided by statute. That defendant in error was at the time of the accident in the exercise of due care. That he was injured and the extent thereof.

The argument of plaintiff in error is confined to the injury and that the evidence does not show walk out of repair. That the defendant in error was lying on or near the walk in question calling for help is not disputed. That one of the boards of the walk was out of place at the time is not disputed. He describes how the accident occurred and this is disputed only by argument and what plaintiff in error calls physical facts. The extent of the injury to defendant in error is testified to by himself and Dr. Irwin, the attending physician, and this is disputed by argument and inference drawn by plaintiff in error from the evidence.

That the city was given the statutory notice of the injury in time to make an investigation is not disputed. That the sidewalk was at the time out of repair and had been for some months prior thereto is testified to by Jacob Scherer, A. B. Hancock, Mary Hogan, Ellen Christy, Ed Voorhees, Mylo Hatchell, Charles Bezon, William Shutto, Mrs. John Green, W. E. Howell, Charles Hogan, Jerry Watson, John Dial, John Atchison, Clay ~~James~~ Holmes and Defendant in error. Upon this question plaintiff in error offered the evidence of J. C. Schoene, R. D. Schmidt, G. W. Sink, Grover Shotwell, J. E. Brown, George Burnish, Ben Angelo, John Maserang, as witnesses showing the sidewalk at this place was not out of repair. The credibility of a number of these witnesses was called in question by plaintiff in error and is now argued.

of the accident and for a sufficient length of time to show that the city had notice thereof, actual or constructive. The City had notice of the accident as provided by the defendant in error was at the time of the accident. That he was injured and the exercise of due care. That he was injured and the exercise of due care. The argument of plaintiff in error is confined to the fact that the evidence does not show with out of the fact that the defendant in error was lying on or near the sidewalk calling for help is not disputed. The fact that the boards of the walk versus of place at the time is not in dispute. He described how the accident occurred and this is not in dispute by argument and what plaintiff in error calls physical facts. The extent of the injury to defendant in error is testified to by himself and Dr. Irwin, the attending physician, and is not in dispute by argument and inference drawn by plaintiff in error from the evidence. That the city was given the statutory notice of the accident in time to make an investigation is not disputed. That the sidewalk was at the time out of repair and had been for some months prior thereto is testified to by Jackson, however, Hancock, Mary Hogan, Allen Christy, and Voorhees, who were present at the time. Charles Hogan, Jerry Watson, John Biel, John Jackson, Charles Hogan, William Shatto, Mrs. John Green, and others. Upon this question of the extent of the evidence of J. C. Delaney, J. H. Brown, George Brown, C. W. Sink, Grover Whitwell, J. H. Brown, George Brown, Angelo, John Macerand, as witnesses showing the sidewalk out of place was not out of repair. The credibility of a number of these witnesses was called in question by plaintiff in error and is now argued.

The Court and the jury trying the case have a duty to perform and with that duty assume responsibility and their finding on questions of fact is entitled to more than formal consideration. The trial court, as well as the jury, see the witnesses, listen to their evidence, and finally upon a motion for new trial the court assumes the responsibility of putting upon that verdict its approval. From that time forward the plaintiff in error assumes the burden of showing on appeal, not only that there has been a mistake in determining where the weight of the evidence lies but that the verdict, if permitted to stand, is contrary to the evidence or that there is no evidence at all to support it. "And where there is a contrariety of evidence on both sides, and the facts and circumstances, by a fair and reasonable intendment, will warrant the inferences of the jury, courts will reluctantly, if ever, disturb their verdict, notwithstanding it may appear to be against the strength and weight of the testimony. So, where the verdict depends upon the credibility of the witnesses, it is the peculiar province of the jury to judge of that credibility, to attach weight to the testimony of each as may seem to be proper, after a due consideration of all the circumstances, arising in the particular case; such as the relationship of the witness to one or both of the parties in controversy, his supposed interest in the event of the suit, his means of knowledge in respect to the matters in dispute, his appearance upon the stand, his manner of testifying, his general character for veracity, and the like, and to find their verdict accordingly." (Lowry v. Orr et al., 1 Gilman 70, (page 83.))

This case upon the facts is not such a case as would justify this court in setting this verdict aside upon the ground that it is against the manifest weight of the evidence, the judgment will therefore be affirmed.

Affirmed.

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(Not to be reported in full.)

The Court and the jury trying the case have to perform and with that duty assume responsibility and find on questions of fact is entitled to more than formal consideration. The trial court, as well as the jury, see witnesses, listen to their evidence, and finally upon a proper for new trial the court assumes the responsibility of putting upon that verdict its approval. From that time forward the plaintiff in error assumes the burden of showing on proper grounds only that there has been a mistake in determining where the weight of the evidence lies but that the verdict, if permitted to stand, is contrary to the evidence or that there is no evidence at all to support it. "And where there is a contrary of evidence on both sides, and the facts and circumstances, by a fair and reasonable intendment, will warrant the inference of the jury, courts will reluctantly, if ever, disturb their verdict, notwithstanding it may appear to be against the strength and weight of the testimony. So, where the verdict depends upon the credibility of the witnesses, it is the peculiar province of the jury to judge of that credibility, to attach weight to the testimony of each as may seem to be proper, after a due consideration of all the circumstances, arising in the particular case; such as the relationship of the witness to one or both of the parties in controversy, his supposed interest in the event of the suit, his means of knowledge in respect to the matters in dispute, his appearance upon the stand, his manner of testifying, his former character for veracity, and the like, and to find thereon accordingly." (Howry v. Orr et al., 101 Minn. 50, 114 N.W. 257.) "This case upon the facts is not such a case as would justify this court in setting this verdict aside upon the ground that it is against the manifest weight of the evidence, the jury will therefore be affirmed."

Attorneys.

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(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court  
at Mt. Vernon, this 28<sup>th</sup> day of July,  
A. D. 1914.

*A. C. Millspaugh*

Clerk of the Appellate Court

# OPINION

*Fee \$*

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1216 1217

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff

And afterwards in Vacation, after said March term, to-wit: On the 28th day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

103 I.A. 321

~~ERROR TO~~  
APPEAL FROM

Huchett  
Adm.

vs.

Circuit

COURT

No. 25

October Term, 1913.

Williamson

COUNTY

Williamson Co.  
Coal Co.

TRIAL JUDGE

Hon. Richard J. ...





Term No. 25.

Agenda . . .

October Term, A. D. 1913.

Angelique Huchette, Administratrix  
of the Estate of J. B. Huchette,  
deceased,

Appellee,

vs.

Williamson County Coal Company,

Appellant.

1887 A. 321

Appeal from Circuit  
Court of  
Williamson County.

Opinion by Harris, J.

The appellee in December 1911 filed in this case a declaration consisting of four counts in the circuit court, all of which charged common law negligence in the same form and language. The first count that the appellee carelessly and negligently failed to prop its roof. That appellee knew of its dangerous condition or could have known of it. That appellee's deceased did not know of such dangerous condition, and did not know of the dangers consequent to its improperly propping roof and did not have equal means of knowing with appellant. The second count that said roof was insufficiently propped and same as first count. The third count that the roof was insufficiently propped and that deceased carelessly and negligently sent into roof cut to assist in extinguishing fire, the escape of gas, the loosening of rock, etc. The fourth count negligent order, unsafe place to work, etc.

All of said counts charged the same negligence.

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deceased,  
of the Estate of J. B. Hutchette,  
Angelique Hutchette, Administratrix

App. 10

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Williamson County Court Company,

Abbeys.

Opinion by Harris. 7.

The appellee in December 1951 filed in this cause a declaration consisting of four counts in the circuit court all of which charged common law negligence in the usual form and language. The first count that the appellee alleged that the appellant failed to prop the roof. That the appellant knew of its dangerous condition or could have known that it was dangerous did not know of such condition. The appellee, and did not know of the dangerous condition, and did not have equal means of knowledge with appellant. The second count that appellant negligently propped and secured the first unit. The third count that the roof was negligently propped and secured. The appellee was carelessly and negligently secured the roof in extinguishing fire, the appellee was careless in extinguishing fire, the appellee was careless in extinguishing fire, etc. The fourth count that the appellee was negligent in the order, manner, and time of the work, etc. All of the counts charged that the appellee was negligent.

he us in the exercise of due care and skill, and that the negligence of Appellant brought about the death of the deceased, and that the sum of Ten thousand Dollars.

The plea of not guilty, filed by Appellant, was joined thereon. From the evidence it was found that there was a trial in July 1912. The record disclosed that there had in April 1913. A disagreement of the jury. After a second trial in May 1913, a verdict of the jury finding Appellee guilty, appellee's damages fixed at \$1400.00. Judgment thereon and this appeal. The facts in this case, the facts of which are in dispute, appear as follows:

The appellant was on the 30th day of January, 1911, and for some time prior thereto operating a coal mine near Johnston City in said county, employing a number of men, among whom was appellee's deceased husband J. B. Thacker. That some two or three days prior to the 20th day of January, 1911, the day of the accident, a fire broke out in the mine and mining operations were suspended and the men were ordered out of the mine. Men were employed to go into the mine to fight and extinguish the fire. Among those employed were appellee's deceased, a man 30 years old, who had been employed in coal mines in France and this country for many years.

In fighting the fire the company employed three shifts of men, the day shift under John Barlow, Mine Master, left the mine on the day in question at 7 P. M. The night shift under George Foster, acting foreman entered the mine at the time the day shift left. Appellee's deceased, Sam Yackus were sent to the 1st cross cut betw. the 1st and Sixth south entries off on the east side of the mine.

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the negligence of appeal in the  
the sum of Ten thousand Dollars.

The plea of not guilty was  
joined thereon. From the evidence it  
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had in April 1912. A disagreement of the jury  
trial in May 1912, a verdict of guilty  
guilty, appellee's damages fixed at \$100,000.  
thereon and this appeal. The first of this case, namely  
fe of which are in dispute, appellee testified:  
The appellant was on the 30th day of  
and for some time prior thereto operated a coal mine in  
Johnston City in said county, employing a number  
among them as appellee's deceased husband J. B. Foster.  
That some two or three days prior to the 30th  
1911, the day of the accident, a fire broke out  
and mining operations were suspended and the  
of the mine. Men were employed to go in and  
and extinguish the fire. Among those employed  
deceased, a man 20 years old, he had been employed in the  
mines in France and this country for many years.  
In fighting the fire the company employed  
shifts of men, the day shift under John Barker, the  
left the mine on the day of the accident. The  
shift under George Foster, called for a  
at the time the day shift left. Appellee  
Sam Jackson and so on the last time and was  
and Barker and Foster.

in extinguishing fire. This arose out prior to the time of the breaking out of fire had been closed up, but to give them a better opportunity to get at the fire which was burning in the fifth entry, the gob was refuse in this cross cut was removed and prior to seven o'clock of the evening of the day in question under direction of mine manager and roof was propped. That the work was done in a proper manner is the testimony of witnesses called by appellee. That a short time before the accident according to the evidence of acting foreman George Foster and Charles Clark, Master Mechanic, walked up the sixth entry south to cross cut near Hutchette, Yackus, Sobleski were working. That after they sounded the roof they both expressed themselves in the presence of the deceased that the place was unsafe and that Foster ordered the deceased and Yackus to leave the place. That Foster took the hose from deceased and Yackus and laid it on the slate putting a stone upon it and that Foster and Clark led the deceased and Yackus out into the sixth entry in a place of safety, ordered them to sit down and wait for them to return. That after they left deceased said to Yackus, his buddy, he was going back to see how the fire was working; he went back and Yackus with him. The testimony of Foster and Clark is corroborated by the evidence of Yackus as to what occurred while they were together and Yackus further says when they returned deceased began to pick the roof with his hand and to use it to crumble and fall in a few minutes, the slate striking from five to eight tons fell upon and killed the deceased.

in extinguishing fire. This cross the fire had been closed up, but the  
of the breaking out of fire had been closed up, but the  
them a better opportunity to get at the fire  
ing in the fifth entry, the men and refused to  
out was removed and prior to seven o'clock of the  
of the day in question under direction of the  
roof was proposed. That the work was done in a  
ner is the testimony of witnesses called by the  
a short time before the accident occurred, at  
of acting foreman George Foster and Charles Clark, a  
Mechanics, walked up the sixth entry south to  
Hutchette, Yackus, Sobieski were on the roof. The  
sounded the roof they both expressed themselves in the  
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Clark led the deceased and Yackus out into the  
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Yackus as to what occurred while they are together  
Yackus further says when they returned deceased  
pick the roof with his hand and caused it to  
fall in a few minutes, the stone weighing from five  
tons fell upon and killed Charles Foster.

Foster, Clark and Yackus were old and experienced men understanding the English language. Foster at time of accident was not employed by appellant. Stanley Sobleski was present at time of accident shortly thereafter left and did not testify. That Sobleski was working at the brackets, not with deceased and Yackus, but fifteen or twenty feet away.

The evidence of an Italian Mike Monari as to the presence of Foster and Clark where deceased and Yackus were working and as to what was done or said is the only evidence in the record upon which appellee base their right to recover. This Witness Monari, who testifies through an interpreter, says his knowledge of the English language was confined to mine talk. That at the time of the accident he had been in America about eighteen months, working at this mine fifteen months; says he was at the place where the accident happened at the time, saw Foster and Clark there, that they left without making any examination of the roof or saying anything to deceased or Yackus. That Foster and Clark did not take deceased and Yackus out of cross cut, although he Monari says that he was away from this place about 30 minutes, but that a canvas in second cross cut, a canvas that other witnesses say was not there. That he, Monari, drew no pay for that night in question and from his evidence, except as to setting up canvas was without employment.

The burden is upon the plaintiff under this proposition to prove by a preponderance of the evidence:

That the deceased while in the exercise of due care and caution was injured by the appellant failing to use reasonable care to furnish deceased with a safe and sound

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at the time, saw Foster and Clark there, that they were  
out making any examination of the road or of any  
deceased or Yakus. That Foster and Clark did not  
deceased and Yakus out of cross cut, although he heard  
that he was away from this place about 30 minutes  
a canvas in second cross cut, a canvas in  
say as not there. That he, Mori, did not see  
night in question and from his evidence, except as to  
up canvas was without employment.

The burden is upon the plaintiff to prove that  
tion to prove by a preponderance of the evidence:  
That the deceased while in the exercise of  
and caution as required by the appellant  
on his case to furnish necessary evidence.



to work. That at time of accident deceased was acting under and in obedience to a special order. That the danger was known to appellant or could have been known by exercise of reasonable care. That deceased did not know of the special danger. That deceased was free from negligence which contributed to the injury. The contention of appellee is that because the case has been submitted to the jury and the jury have answered the special interrogatories submitted and by general verdict found for appellee that it puts this case in that category where the Court have said: "When there is contrariety of evidence and the facts and circumstances by fair and reasonable intendment will authorize a verdict notwithstanding it may appear to be against the strength and weight of the testimony the verdict will not be set aside. The examination of the record in this case with the facts upon which those decisions are based calls for the application of an entirely different rule.

That deceased was working under a general order and special order and that the danger was pointed out to deceased and Yackus and they taken to a place of safety is denied by Foster, Clark and Yackus, denied only by the It is known as Mike Monari, with all the circumstances and inferences to be drawn from the evidence corroborating the witnesses and not the one witness. When these facts are taken and the condition of this record the duty of this Court is as said in the case of Illinois Steel Co. vs Kennedy, 100 App., 83, "If the finding of the jury be vitiated by any error whatever, or if it be contrary to the manifest weight of the evidence, in either case the duty of this Court is:

to work. That at it is of an instant decision. and in obedience to a special order. That the known to appellant or could have been known to appellant. That deceased did not know of the danger. That deceased was free from any liability attributed to the injury. The consideration of the case because the case has been submitted to the jury and have answered the special interrogatories and the general verdict found for appellee in the first that category here the Court have said: "When the consistency of evidence and the facts and circumstances fair and reasonable judgment will authorize a verdict notwithstanding it may appear to be against the weight of the testimony the verdict will not be reversed. The examination of the record in this case will show upon which those decisions are based solely for the purpose of an entirely different rule."

That deceased was working under a special order and that the danger was known to appellant and Yackma and they taken to a place of safety. of Foster, Clark and Yackma, denied only by the testimony of Mike Monrill, with all the circumstances and references to be drawn from the evidence concerning the witnesses and not the one witness. and the condition of this record for the duty of the jury as said in the case of Illinois Steel Co. v. Illinois App., 83, "If the finding of the jury be whatever, or if it be contrary to the weight of the evidence, it is after all the duty of the jury to find."

declare and to set aside a judgment based upon ~~some~~ <sup>the</sup> evidence. <sup>Citing</sup> many cases where the Supreme Court so held, but it re-  
vised questions of fact."

A second verdict based upon substantially the same evidence will be set aside as against the evidence and the final judgment rendered in favor of adverse party where the evidence does not support the judgment in the lower court. (Harvey vs McGuirk 168 App., 390).

The mere fact that a jury have passed upon questions of fact cannot absolve this court from determining whether or not the verdict is justified by the evidence. (I. C. R. R. vs Cunningham, 102 App., 306).

The verdict and judgment in this case being without sufficient evidence to support it and the case having been tried at least twice in the lower court and from the record it appears all of the facts have been brought forward by both parties material to the issues a new trial would serve no good purpose and the case will be reversed with a finding of fact as it would not be of any advantage to either of the parties to discuss other errors assigned.

We are of the opinion that justice and the best interest of the parties require an end to be put to this unfortunate and expensive litigation and the judgment of the circuit court is therefore reversed.

Reversed with finding<sup>ing</sup> of fact.

Finding of fact to be incorporated in the judgment of the Court:

That the deceased J. B. Hutchette was not exercising due care for his life. That he had been taken from the place where he was

decide and to set aside a judgment based upon evidence which is not sufficient to sustain the verdict. In many cases where the Supreme Court has so held, the question of fact is viewed.

A second verdict based upon evidence which is not sufficient to sustain the verdict will be set aside as against the evidence. Final judgment rendered in favor of a party, where evidence does not support the judgment is reversible. (Harvey vs McGuirk 188 App., 380).

There were facts that a jury have decided upon. The fact cannot be appealed from. The verdict is not the verdict is justified by the evidence. (110 App., 380).

The verdict and judgment in this case being sufficient evidence to support it and the case being tried at least twice in the lower court, the fact that it appears all of the facts have been presented to the parties material to the issues and the case will be reversed. The fact as it would not be of any advantage to the parties to discuss other errors.

As one of the parties had the right to a trial by jury, the interest of the parties requires an appeal from the verdict. The fact that the parties had the right to a trial by jury, the interest of the parties requires an appeal from the verdict. The fact that the parties had the right to a trial by jury, the interest of the parties requires an appeal from the verdict.

Reversed with instructions.  
Finding of fact to be entered.

Court:

That the deceased J. B. White was killed by the accident and not otherwise. That he had been taken from the scene of the accident.

by appellant to a place of safety at the  
of the place where he was hurt. His injury  
injury was in violation of these directions.

(Not to be reported in full.)

by an attempt to ... of the time ... injury was ...

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28<sup>th</sup> day of July, A. D. 1914.

*[Signature]*

Clerk of the Appellate Court

# OPINION

*Fees*



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A 328  
*Opinion of the Appellate Court*

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.  
Hon. James C. McBride, Justice.  
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff

And afterwards in Vacation, after said March term, to-wit: On the 28th day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Russell

vs.

No. 49

October Term, 1913.

O'Gara Coal Co

~~ERROR TO~~  
APPEAL FROM

188 I.A. 328

Circuit COURT

Saline COUNTY

TRIAL JUDGE

Hon. T. M. Harris



Term No. 49.

October Term, A.D. 1915.

Essa Russell,

Appellee,

vs.

O'Gara Coal Company,

Appellant.

Appeal from Circuit Court of  
Saline County.

1881 A. 328

Opinion by Harris, J.

The declaration in this case consists of three distinct counts, the first charging a demand for props from mine men and a failure to furnish suitable props. The second count charges a custom and practice adopted in mines and known and recognized by appellant, whereby the diggers would order props, caps and timbers from the timber-man and that appellee had ordered so ordered but that appellant wilfully failed to provide them. The third count charges a dangerous condition in the mine where appellee's deceased was required in the exercise of his duties to be, consisting of loose slate, rock and other substance forming a part of the roof of said room, and that appellant knew of this dangerous condition or could have known thereof. That appellant allowed Thomas Russell to enter said room and to work therein without the direction of the mine manager before the said dangerous condition had been made safe. That in each of said counts it is alleged by reason thereof that Thomas Russell was injured from which injuries he died and that appellee as his surviving widow has been damaged, etc. To each of the counts the general issue was filed, and a trial followed, verdict of jury finding appellant liable.

October Term, A.D. 1918.

Thomas Russell,  
 Appellee,  
 vs.  
 O'Leary Coal Company,  
 Appellant.

Appeal from Circuit Court  
 of the County.

1981A.328

Opinion by Harris, J.

The declaration in this case contains two counts. The first charging a demand for gross profit from the mine and a failure to furnish suitable props. The second charging a custom and practice adopted in mines and quarries and recognized by appellant, whereby the diggers would extract the caps and timbers from the timber-man and that appellant had so ordered but that appellant willfully failed to do so. The third count charges a dangerous condition in the mine where appellee's deceased was employed in the extraction of duties to be, consisting of loose slate, rock and other substance forming a part of the roof of mine room, and that appellant knew of this dangerous condition or could have known thereof. That appellant allowed Thomas Russell to enter the room and to work therein without the attention of the mine manager before the said dangerous condition had been made safe. That in each of said counts it is alleged by reason whereof Thomas Russell was injured from which injuries he died, that appellee as his surviving widow has been bereaved, and To each of the counts the General Issue was tried, and a trial followed, verdict of jury finding appellant liable.

assessing appellee's damages at \$1000.00; judgment was entered from which judgment this appeal was prosecuted.

The facts as they appear from the record are that on the 2nd day of March, 1911, Thomas Russell was employed by appellant as a loader of coal and was working in room 6 of the 6th South off of the main east entry, with his brother Raymond Cross with whom he had worked for three months. The room was thirty feet wide and one hundred twenty feet in depth with a roof of what was called draw slate, and a floor of slate or hard substance. That the height of the room varied, depending upon amount of hanging slate. The vein of coal was from six feet two inches to six feet four inches. For three months or more it had been the custom to use props, caps, and timbers of the timberman and he with the timberman would deliver them, measure and saw them to fit. About five days before the accident Cross says Hughes, the timberman, was in this room and asked Cross and Russell if they had any props, to which Cross says he said yes and Hughes said no, but props were delivered, although the timberman did not return to saw and fit them. They were not of suitable length to be used. There was an attempt by Russell to fit a suitable prop on morning of accident and in the attempt he went into the entry and brought back a split prop and it was which with the fall that followed broke. The breach of this draw slate from the evidence was understood by Cross and by the timberman and the mine manager from the evidence existed in sounding the roof and the timberman's inquiry. That there were props in the room at the time of the accident, but were not suitable props under the custom that existed was recognized by the company in that they had not used them and sawed in suitable lengths. That the proper way of setting

[illegible]

a prop was with a cap and an order for props was given to include caps and timbers. But even a fall of this slate roof, on the day in question Thomas Russell fell from which injuries he died.

The contention of appellant upon these facts is that at the time appellee's deceased ordered props, no props needed and an order given in advance is not within the statute. From the evidence as to the condition of the roof in the mine such a rule if adhered to would either stop further work, a dangerous condition was discovered until props were ordered and arrived or the gigger would not live to see the props arrive. The statute is entitled to a more liberal construction and has been so construed in the case of *Poreba v. Ill. Coal Co.*, 156 App., 140.

It is further contended by appellant that the accident was not caused for want of props because he had unused props. This is true as a bare statement still it must appear that he had props of suitable length, and in this case where the court has adopted and recognized a custom in regard to the manner of ordering props, caps and timbers and leaving the timberman to measure and determine the lengths of suitable props, it is bound by such a custom, and the timberman under the facts is a vice-principal and his knowledge and neglect of duty is that of the company.

There is the same contention by appellant with reference to a dangerous condition and that deceased continued to work the two days after props were ordered. The timberman in the room charged with knowledge of whatever dangerous conditions existed and permitted the deceased to work without the knowledge of the mine manager. Appellant charged with notice that a dangerous condition existed. Contributory negligence assumed risk constituted no defense.

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to include each and every...  
state court, on the day...  
from which...  
The contention of...  
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a dangerous condition was discovered...  
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arrive. The statute is entitled to a...  
tion and has been so construed in the case of...  
Coal Co., 156 App., 140.

It is further contended by appellant that the...  
was not caused for want of proper...  
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bound by such a...  
a vice-president and his...  
of the company.

There is the same contention by appellant...  
to a dangerous condition and that...  
the two days after...  
the room charged with...  
existed and permitted the...  
of the mine manager...  
dangerous condition existed...  
assumed risk constituted in...  
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Appellant says the evidence in this case is such that therefore the rulings of the court in admitting evidence and instructing jury should be accurate. There are no errors in the ruling of the court in admitting evidence and the same called to the attention of this court.

The complaint by appellant as to appellee's given instruction number one that it refers <sup>the jury</sup> to declaration refers to props and timbers when the evidence was with reference to props. The instruction undertakes to set out what it is necessary for appellee to prove under first count of the declaration. Under the evidence in this case the undisputed evidence that under the custom props, caps and timbers with minor saw timber man were inseparable. Under the evidence it is not clear that more than one order for props was given so the instruction as to time could not be misleading.

What has been said of appellee's first instruction applies to second and as to who was injured could not have misled the jury as no injury could result to appellee except by death of her husband.

What has been said of instructions one and two applies to appellee's given instructions three and four. Appellant's contention not good where appellant proves that she admits custom and recognition of it by offering no evidence to the contrary.

Appellee's given instructions numbered 6, 8 and 9 are consistent and state substantially the law. The objection to modification of appellant's sixteenth instruction is not well founded as the instruction modified was a correct statement of the law as applied to the facts. That appellee could not be held liable where deceased wilfully violated the mining statute.



involved under the facts in this case.

The modification of appellant's nineteenth instruction, striking out the word "direct" and inserting the word "indirect" is not error but is approved in case of Chicago North Branch v. Schmelling 197 Ill. 630.

Appellant contends there was error in the court refusing a number of its instructions but no special error is assigned that goes to the merits of the case. When these refused instructions are examined in connection with the instructions given the jury, we find the jury were fully instructed upon the facts and under the pleadings in this case.

We find no reversible error in this record and the judgment will therefore be affirmed.

Affirmed.

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(Not to be reported in full).

involved under the facts in this case.

The modification of appellant's original testimony

striking out the word "direct" and inserting the word

is not error but is approved in case of the jury.

Recommending 187 Ill. 630.

Appellant contends there was error in the court's

revised a number of its instructions but no specific error is

assigned that goes to the merits of the case. For this

these instructions are examined in connection with the

the jury, we find the jury were fully instructed upon

and under the pleadings in this case.

We find no reversible error in this record and the

judgment will therefore be affirmed.

affirmed.

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(Not to be reported in full).

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28<sup>th</sup> day of July.

A. D. 1914

A. C. MILLSPAUGH

Clerk of the Appellate Court.

# OPINION

*Fee \$*

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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff

And afterwards in Vacation, after said March term, to-wit: On the 28<sup>th</sup> day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Still, et al  
Ex -  
No. 61  
October Term, 1913.  
Still

~~ERROR TO~~  
APPEAL FROM

188 I.A. 330

Circuit

COURT

Madison

COUNTY

TRIAL JUDGE

Hon. Louis Bernheimer





Term No. 61.

October 1910 . . . . .

Henry, James and Charles Still,  
Executors of Estate of Ann Still,  
deceased,

Appellees,

vs

Edward Still,

Appellant.

1881.2 230

Opinion by Harris, J.

This is a suit brought by appellees, in and before a Justice of the Peace in Madison County, Circuit Court and from of record of said court.

The facts are that Thomas Still, deceased, was owner of the northeast quarter of the northeast quarter of section 14, township 6 range 1 east of range 1, Madison County. That Thomas Still died in the year of 1909 leaving a last will and testament probated in and of which said will said Thomas devised to his wife Ann Still. That at the death of said Thomas Still and for some time thereafter said land was occupied by appellant, Edward Still, but with some arrangement between them, the exact nature of which is neither admitted nor denied in this case. That after the death of said will aforesaid appellant continued to occupy said land until February, 1910, a forcible detainer was brought by Justice of the Peace of said Madison County, and

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of said land by Ann Still against George Still, judgment entered in favor of Ann Still and against appellant for the rent due and unpaid and for the possession of the land, and of restitution issued and execution.

That afterwards appellant <sup>t</sup>desiring to keep the property upon a settlement of the judgment since said with him. Still to lease said land for one more year for \$100.00 a portion of the back rent involved in the forcible detainer judgment. A written lease was prepared and signed by Ann Still appellant on the 8th day of April, 1910 for one year. The terms of the lease and the description were written in said lease. Mr. McGinnis, Attorney for Ann Still in the presence of appellant and the consent of appellant. By mistake the word north was used in the description where the word northwest should have been.

That on September 10, 1910, appellant paid to Ann Still upon the rent due under this lease the sum of \$100.00. At the expiration of the one year a demand in writing was made for possession, a complaint in writing properly describing the land and this suit brought.

That since the orders for appeal were taken by the court appellee died; her last will and testament probated on September 22, 1913, a copy of the same being filed in this court, suggestion on the record of death of appellee, and the names of Henry James and Charles Still, as executors of the last will of appellee, deceased, as appellees.

Appellant urges three grounds for reversal.

1st. That the procurement of the lease between appellee and appellant was procured by threats and intimidation.

2nd. Because the description in the lease does not describe the land occupied by appellant.

... .. and also to  
... .. at ... ..  
... .. and ... ..  
... .. and ... ..  
... .. and ... ..

and this said growth.

That since the 1940s, the FBI has been a part of the  
civilian control system for the purpose of maintaining  
the peace, a copy of the same being to be made  
available on the record of each of the following  
of Henry James and James Hall, as follows:

[illegible]

3rd. Because appellee never had the right of possession to the premises.

What is procured by threats or intimidation must constitute duress and avoid what would otherwise be an obligation must be present and operative at the time of the making of the instrument, such threat or intimidation must destroy his free agency and make his act not his own but the act of another. This is not even claimed by appellant and this claim afterwards recognized by him and payment made thereunder. If not claimed he was even being urged to make payment.

The first proposition not being sustained, the parties have a binding lease with a mis-description recognizing the parties as a mistake because appellant says the premises occupied were the same as involved in this suit and he was paying rent on the premises he occupied and no other. Here the mistake in description is properly explained and the first proposition is without merit.

The third proposition and the authorities cited therein do not apply to this case because from a clear reading of the evidence one suit was brought by appellee for rent compromised by appellant, a new lease was made between parties, payment of rent thereunder by appellant, a continuance of the tenancy thereunder to the bringing of this suit, and appellant having attorned to and till ed his landlord, is estopped from either questioning her title or right to possession as long as he remains her tenant.

There is no error in this case and the judgment is affirmed.

Affirmed.

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(Not to be published in full.)



I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 27<sup>th</sup> day of July, A. D. 1914.

*A. C. Millspaugh*

Clerk of the Appellate Court

# OPINION

*Fee \$*

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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff

And afterwards in Vacation, after said March term, to-wit: On the 26<sup>th</sup> day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Emery

~~ERROR TO~~  
APPEAL FROM

183 I.A. 342

Circuit COURT

vs.

No. 9

March Term, 1914.

Jasper COUNTY

Hurst

TRIAL JUDGE

Hon. Hon. J. M. Harris



Term No. 9.

1926-1927.

March Term, D. 1914.

George D. Emery,

Appellant.

vs.

E. W. Herish,

Appellee.

Appeal from Superior Court,  
County.

188 I.A. 342

Opinion by Harris, J.

Appellant filed his declaration in assumpsit containing of two counts, the first a special count averring that by reason of an oral contract appellee had per appellant's attorney on the 27th day of July, 1910, in the city of Seattle, State of Washington, to examine titles to certain lands in Itasca County in said State, to advise regarding said titles and prepare forms for issue of bonds and represent appellant in the transaction then pending for the issue of said bonds, as his attorney, subject to an agreement between the owner of said lands and appellee. That appellee agreed to do said part of said agreement and necessarily expended the sum of \$16.00. That by reason of a disagreement between appellant and the owner of the lands, said bonds issue was delayed. On September 1st, 1910, an appellee became liable to pay appellant the full amount of attorney fee and expenses.

The second count the common count.

That the appellee filed the general issue a trial verdict, a verdict for appellant in sum of \$56.25; upon said verdict for new trial verdict was set aside, new trial was granted, a trial by court fixed, for appellee.

Baron's Case, 17, 1901.

George L. Emery,

Appellant.

vs.

E. W. French,

Defendant.

General Term of the  
County.

1887-1888

Opinion of the Court.

Appellant filed his declaration in the County Court of the County of...

of two counts, the first a declaration for...

reason of an oral contract with the defendant...

attorney on the 27th of July, 1901, in the County...

State of Washington, to execute title to...

first count, in which state, to state regard to...

and prepare forms for same and to execute same...

in the transaction then pending, and the same...

for, as his attorney, subject to the payment of...

owner of said lands and to execute same...

appellant for said services the sum of...

any expenses. That appellant in all respects...

said part of said agreement and necessarily...

of \$18.00. That by reason of a disagreement...

and the owner of the lands, said bond was...

September 1st, 1901, and appellee bore the...

the full amount of attorney fees and...

The second count the common counts...

That the appellee the general terms of...

verdict for appellant in sum of \$50.00...

for new trial verdict was set aside...

however, a trial by court then...

The amount of appellant's fee and expenses are not in dispute, That appellant was employed by appellee as his attorney is not a matter of dispute. The errors assigned resolve themselves into two questions of fact:

First: Appellee claims that he employed appellant after the bonds were issued and everything completed to furnish a written opinion as to legality of the issue, such an opinion as appellee could furnish purchasers of the bonds.

Second: That appellant was to be paid out of a fund of \$2500.00 allowed by the owners of the land to appellee and in no other way.

When these two questions of fact are disposed of all errors assigned and argued upon this appeal will be settled accordingly.

The first proposition as a question of fact calls for the judgment of the court as to whether appellant was employed as claimed by appellant or appellee. Appellant claims and in this is supported by Witness Rose that he was employed by appellee to investigate the title, prepare bonds, etc. The correspondence between appellant and appellee show that such service was being rendered from the 1st of August to the 1st of September, 1910, and that appellee upon this proposition is his denial without corroboration of either witness or correspondence. Indulging and giving to the trial court the benefit of that presumption that only competent evidence was considered we can not, when all the competent evidence is considered, justify the finding. Where the judgment is against the manifest weight of the evidence so that if permitted to stand the court was satisfied there had been a miscarriage of justice it should be set aside.

The amount of appellant's fee and expenses are in dispute, that appellant was employed by appellee, and that the amount of the fee and expenses is not a matter of dispute. The court resolved these two questions of fact into two propositions:

First: Appellee claims that he employed appellant and that bonds were issued and everything completed to furnish a certain opinion as to legality of the issue, such an opinion appellee could furnish purchasers of the bonds.

Second: That appellant was to be paid out of the fund of \$2500.00 allowed by the owners of the land to appellee in no other way.

When these two questions of fact are disposed of, the case assigned and argued upon this appeal will be settled conclusively.

The first proposition as a question of fact only involves judgment of the court as to whether appellant was employed or not by appellee. Appellant claims and in this is supported by witness here that he was employed by appellee to investigate the title, prepare bonds, etc. The correspondence between appellant and appellee shows that such services were rendered from the 1st of August to the 1st of September, 1910, and that appellee upon this proposition is in the denial without corroboration of either witness or correspondence. Involving and giving to the trial court the benefit of the presumption that only competent evidence was considered by the court, when all the competent evidence is considered, justifying the finding. Where the judgment is against the appellant, the evidence so that it is permitted to stand the court satisfied there had been a miscarriage of justice if the case was not settled.

The second proposition when the evidence is taken is without either evidence or merit. There is no evidence on the record that appellant ever agreed with appellee to accept employment and take fee and expenses out of the equity of \$2500.00 or to look to the direct record of the estate of Rose who was President and principal owner thereof for fee and expenses. The appellee does not so appoint appellant to this. It would be necessary to bind appellant to show by some evidence that appellant knew of this arrangement, acquiesced in it, and agreed to accept employment for the same.

We are satisfied from the undisputed evidence in this case that the judgment is contrary to the manifest weight of the evidence and ought to be set aside and new trial granted. The judgment will therefore be reversed and cause remanded.

Reversed and remanded.

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(Not to be reported in full).

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I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court  
at Mt. Vernon, this 28<sup>th</sup> day of July,  
A. D. 1914

Clerk of the Appellate Court

# OPINION

*Fee \$*

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133

~~FILED~~

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff

And afterwards in Vacation, after said March term, to-wit: On the 28 day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

ERROR TO  
APPEAL FROM

Salerno

188 I.A. 343

vs.

Circuit

COURT

No. 19

March Term, 1911.

St Clair

COUNTY

Mo. & Ill. Coal Co.

TRIAL JUDGE

Hon. W. E. Hadley



Term No. 19.

Agenda No. 39.

March Term, A. D. 1914.

|                     |   |                   |
|---------------------|---|-------------------|
| Joseph Salerno,     | ) |                   |
|                     | ) |                   |
| vs. Appellee,       | ) | Appeal from       |
|                     | ) | Circuit Court of  |
| Missouri & Illinois | ) | St. Clair County. |
| Coal Company,       | ) |                   |
| Appellant.)         | ) |                   |

Opinion by Harris, J.

1881 A. 343

This suit was brought by appellee against appellant and tried upon the charges made in an amended declaration consisting of four counts, and the plea of not guilty. The first count of the declaration aside from the formal allegations in substance charged:

That while appellee on the 2nd day of March, 1912, was mining coal from room nine off the 12th south entry there existed in the roof of said room at or near the face thereof a lot of rock, slate and other substance which was likely to come down at any time and injure those working in the room and finding that props, caps and timbers were necessary to support the roof thereof at said point, he then and there demanded of the mine manager of appellant that he then and there deliver at the usual place a number of seven foot props, Caps and timbers to rescue said roof at said point for their own safety; that appellant wilfully failed and omitted through its mine manager to make delivery thereof as demanded, whereof and while appellee was loading coal into a car at the place aforesaid and passing beneath and under said loose rock, slate and other substance, by reason of said wilful failure of appellant to furnish said props, caps and timbers a lot of said over-hanging rock and other sub-

March Term, A. D. 1814.

Appeal from  
Circuit Court of  
St. Clair County.

Joseph Salarno,  
Appellee,  
vs.  
Missouri & Illinois  
Coal Company,  
Appellant.

1881.4.343

Opinion by Harris, J.

This suit was brought by appellee against appellant and tried upon the charges made in an amended declaration and finding of four counts, and the plea of not guilty. The first count of the declaration aside from the formal allegations in substance charged:

That while appellee on the 2nd day of March, 1812, was mining coal from room nine off the 12th south entry there existed in the roof of said room at or near the face thereof a lot of rock, slate and other substance which was likely to come down at any time and injure those working in the room and finding that props, caps and timbers were necessary to support the roof thereof at said point, he then and there demanded of the manager of appellant that he then and there deliver at the said place a number of seven foot props, Caps and timbers to rescue said roof at said point for their own safety; that appellant willfully failed and omitted through its mine manager to make delivery thereof as demanded, whereof and while appellee was loading coal into a car at the place aforesaid and beneath and under said loose rock, slate and other substance, by reason of said willful failure of appellant to furnish said props, caps and timbers a lot of said over-hanging rock and other substance

stance fell and permanently injured appellee to the damage of \$3,000.00.

The second count after describing locality, condition, etc., as in the first count charges that the mine examiner failed to inspect the roof of said room at said point and to observe said dangerous condition of said roof thereat and to <sup>record</sup> make thereof in a book kept for that purpose, before the miners were permitted to enter said room for work in consequence whereof appellee was injured, etc., as alleged in said first count.

The third count alleges the same general condition as first count and charges that the mine examiner of appellant entered said room and inspected the same and observed said loose rock, cld, dirt, slate and other substance in said roof at said point and wilfully failed to place a conspicuous mark or sign thereat as notice to keep out and wilfully failed to make a daily x record of the same in a book kept for that purpose before the miners were permitted to enter said mine for work; by means whereof appellee was injured, etc., as alleged in the first count.

The fourth count describes the same general conditions at the point in question at the time and as alleged in first count and charges that appellee on the 2nd day of March, 1912, demanded of mine manager of appellant props to secure the roof at said point and he was then and there informed by said mine manager that appellant had no props of the length required in said room at said point and that mine manager then and there informed appellee that he would go into said room and examine said roof to observe whether it was safe for work and said mine manager went into said room and made an examination of the roof thereof and reported to appellee that the roof was all right

space left and permanently injured appellee to the damage

of \$3,000.00.

The second count after describing locality, condition,

etc., as in the first count charges that the mine examiner

failed to inspect the roof of said room at said point and to

observe said dangerous condition of said roof thereof and to

make thereof in a book kept for that purpose, before the miners

were permitted to enter said room for work in consequence whereof

of appellee was injured, etc., as alleged in said first count.

The third count alleges the same general condition as the first

count and charges that the mine examiner of appellant entered

said room and inspected the same and observed said loose rock,

clod, dirt, slate and other substance in said roof at said

point and willfully failed to place a conspicuous mark or sign

thereat as notice to keep out and willfully failed to make a daily

x record of the same in a book kept for that purpose before the

miners were permitted to enter said mine for work; by means

whereof appellee was injured, etc., as alleged in the first

count.

The fourth count describes the same general condition as

the point in question at the time and as alleged in first count

and charges that appellee on the 2nd day of March, 1917, de-

manded of mine manager of appellant props to secure the roof

at said point and he was then and there informed by said mine

manager that appellant had no props of the length required in

said room at said point and that mine manager then and there

informed appellee that he would go into said room and examine

said roof to observe whether it was safe for work and said that

manager went into said room and made an examination of the roof

thereof and reported to appellee that the roof was not safe.



and reasonably safe, and then and there directed appellee to proceed with his work of loading coal and appellee in pursuance of said order and relying upon the examination made by said mine manager did proceed at point in question, by reason whereof he was permanently injured, etc., as alleged in first count.

Upon the issues so joined a trial was had by jury and a verdict returned in favor of appellee for the sum of \$1,350.00. Motion by appellant for new trial, which was overruled, judgment and this appeal.

Appellant in presenting its reasons for a reversal of the judgment assigns and argues but two general propositions.

First: That under the evidence as applied to each count of the declaration there cannot be a recovery.

Second: That the trial court committed reversible error in refusing to give appellant's first refused instruction.

Under appellant's first general proposition before entering upon details as to fact it will save time and space to state some of the facts as to conditions as they existed on March 2, 1912, which applies to each of the four counts:

Appellee and his buddy Paul Palermo were miners of considerable experience familiar with the terms used and rules of mining in and about the mine in question. Appellant's Mine Superintendent Rauth, Acting Mine Manager Butler, Assistant Mine Manager Branden and Mine Examiner Montieth were all men of experience in and about mines of this kind, familiar with different conditions, dangers and the rules of mining. That in appellant's mine appellee and his buddy laid off room nine off the 12th south entry, which at the time of the accident had been cut from 12 to 21 feet wide, some of the time widened and a part of the time narrowed to in the neighborhood of 60 feet to face

and reasonably safe, and then and there directed it to proceed with its work of loading coal and appellee in accordance of said order and relying upon the examination made by said mine manager did proceed at point in question, by reason whereof he was permanently injured, etc., as alleged in first count.

Upon the issues so joined a trial was had by jury and verdict returned in favor of appellee for the sum of \$1,000.00. Motion by appellant for new trial, which was overruled, judgment and this appeal.

Appellant in presenting its reasons for a reversal of judgment assigns and argues but two general propositions. First: That under the evidence as applied to each count of the declaration there cannot be a recovery.

Second: That the trial court committed reversible error in refusing to give appellant's first refused instruction.

Under appellant's first general proposition before entering upon details as to fact it will save time and space to state some of the facts as to conditions as they existed on March 2, 1912, which applies to each of the four counts. Appellee and his buddy Paul Walters were miners of considerable experience familiar with the terms used and rules of mining in and about the mine in question. Appellant's superintendent, Acting Mine Manager Butler, Assistant Mine Manager Branden and Mine Examiner Monticelli were all men of experience in and about mines of this kind, familiar with different conditions, dangers and the rules of mining. That in appellant's mine appellee and his buddy laid off room mine off 12th south entry, which at the time of the accident had been from 12 to 21 feet wide, some of the time widened and some of the time narrowed to in the neighborhood of 60 feet.

of coal. The vein of coal was from 6 to 6½ feet thick. The roof was what was called a rock or slate roof. The kind of roof was the reason for narrowing and widening the room. That what was called whitetop in the roof was familiar to both appellee and the witnesses heretofore named of appellant as of bluish color and of a brittle nature. That it might be discovered and known before falling or it might not. That the roof might upon examination sound all right and soon break and fall. That the precautions as to width of room and frequent examinations of the roof was because all the witnesses recognized the dangers of the kind of a roof in said room nine. That the method of making safe such a roof is by taking down the clod, bastard or stone or by, if the piece is too large, putting in numerous props. That the piece that fell was white top six to eight inches thick, seven or eight feet long, and three to four feet wide, located seven or eight feet from face of coal. That to have secured it by props would have required props, about seven feet in length. That but one prop was set in this room and no attempt had been made to remove this stone clod or white top from the roof. That the mine examiner was in mine and this room on the morning of the accident but placed no danger marks upon any part of this roof. That the mine manager was in room and sounded this portion of the roof on day of accident, about two hours previous to accident, pronounced it safe and ordered the room widened. That this visit and examination was made because he knew the roof was changing. The above are practically undisputed facts.

Appellee and Paul Palermo, his buddy say this condition of the roof began to show white top and dangerous on Tuesday before the accident on Saturday and on Friday coal was undercut,

of coal. The vein of coal was from 6 to 8 feet thick. The roof was what was called a rock or slate roof. The kind of roof was the reason for narrowing and widening the room. What was called whitetop in the room was familiar to both police and the witnesses heretofore named as appellants and of bluish color and of a brittle nature. That it might be dis- covered and known before falling or it might not. That the roof might upon examination sound all right and soon break and fall. That the precautions as to width of room and frequent examinations of the roof was because all the witnesses recog- nized the dangers of the kind of a roof in said room nine. That the method of making safe such a roof is by taking down the old, bastard or stone or by, if the piece is too large, putting in numerous props. That the piece that fell was white top six to eight inches thick, seven or eight feet long, and three to four feet wide, located seven or eight feet from face of coal. That to have secured it by props would have required props, about seven feet in length. That but one prop was set in this room and no attempt had been made to remove this piece of old or white top from the roof. That the mine examiner was in mine and this room on the morning of the accident but placed no danger marks upon any part of this roof. That the mine man- ager was in room and sounded this portion of the roof on day of accident, about two hours previous to accident, pronounced it safe and ordered the room widened. That this visit and ex- amination was made because he knew the roof was changing. The above are practically undisputed facts.

Appellee and Paul Palmer, his buddy say this condition of the roof began to show white top and dangerous on "waddy" be- fore the accident on Saturday and on Friday coal was undercut.

loading was done and in the evening coal was shot down. That on Friday evening appellee through his buddy demanded of the mine manager seven foot props be sent down to make roof safe. The same request was made on Saturday morning and that mine Manager said he would send seven foot props if they had them and on Saturday morning said if they did not have them he could come down. That there were no props in room except six foot prop that was set by appellee.

Appellant's witnesses say that no seven foot props were ordered. That the custom of ordering props was by black board at bottom of mine. That props from six to six and a half feet were in room at time and were of sufficient length for use at this place. That appellee was familiar with these conditions and should have removed the white top or substance that fell.

Applying the above to appellant's arguments as to first count of declaration upon the question of whether seven foot props were demanded, whether props were needed and whether there were in the room at time props of sufficient length to support the roof were questions of fact submitted to the jury and upon which there was a sufficient dispute to warrant the court in accepting the verdict of the jury as binding.

The application of the same rule in considering the facts under the second and third counts of the declaration that from the evidence a dangerous condition appeared on Thursday and Friday before accident and should have been made a matter of record and marked by mine examiner on Saturday morning was a question in dispute and upon which evidence was offered.

If white top was discovered on Thursday and Friday and was known to make a roof dangerous the mine examiner should have discovered it. There being evidence of this fact the question

loading was done and in the evening coal was shot down. On Friday evening appellee through his buddy demanded a prop. Mine manager seven foot props he sent down to make room. The same request was made on Saturday morning and that mine Manager said he would send seven foot props if they had them and on Saturday morning said if they did not have them he would come down. That there were no props in room except six foot prop that was set by appellee.

Appellant's witnesses say that no seven foot props were ordered. That the custom of ordering props was by black board at bottom of mine. That props from six to six and a half feet were in room at time and were of sufficient length for use at this place. That appellee was familiar with these conditions and should have removed the white top or substance that fell. Applying the above to appellant's arguments as to first count of declaration upon the question of whether seven foot props were demanded, whether props were needed and whether there were in the room at time props of sufficient length to support the roof were questions of fact submitted to the jury and upon which there was a sufficient dispute to warrant the court in accepting the verdict of the jury as binding.

The application of the same rule in considering the first under the second and third counts of the declaration that the evidence a dangerous condition appeared on Thursday and Friday before accident and should have been made a matter of record and marked by mine examiner on Saturday morning was a question in dispute and upon which evidence was offered. If white top was discovered on Thursday and Friday and was known to make a roof dangerous the mine examiner should have discovered it. There being evidence of this fact the question

whether an unsafe condition existed which could by the exercise of reasonable diligence on the part of mine examiner been discovered was a question for the jury to determine, and if found to be dangerous then it was the duty of the mine examiner to have marked it and made a record accordingly.

The fourth count of the declaration the evidence of an examination by mine manager, a direction to appellee to work, due care upon the part of appellee, and the evidence as to direction of the assistant mine manager to take down the rock, cinder or stone and appellee's failure to obey and the furnishing by appellant to appellee of a reasonably safe place to work were all submitted to the jury and if a recovery in this case and the sustaining of this verdict depended upon this count, the evidence and the application of the law might bring about a different result. But as we are of the opinion that there is sufficient evidence under the statutory counts to sustain the judgment and a general verdict under one good count to sustain it is sufficient for not encumbering the record with a discussion of the evidence applicable to this count and law, of willfully violating orders, equal means of knowledge, assurance of safety, risks assumed and changed conditions cited by appellant and applicable to this count.

Under the three statutory counts it is argued that even if the mining statute was by appellant violated, there is no showing that the violation was the proximate cause of the injury. The proximate cause is not necessarily the beginning but the efficient cause, such a cause in the absence of proof of which the court would say as a matter of law the injury would not have occurred.

whether an unsafe condition existed which could be the cause of reasonable diligence on the part of mine examiner been discovered was a question for the jury to determine, and it is to be dangerous then it was the duty of the mine examiner to

have marked it and made a record accordingly.

The fourth count of the declaration the evidence of an examination by mine manager, a direction to appellee to stop, the case upon the part of appellee, and the evidence as to direction of the assistant mine manager to take down the rock, or stone and appellee's failure to obey and the furnishing by appellee to appellee of a reasonably safe place to work were all submitted to the jury and if a recovery in this case and the sustaining of this verdict depended upon this count, the

evidence and the application of the law might bring about a different result. But as we are of the opinion that there is sufficient evidence under the statutory counts to sustain the judgment and a general verdict under one good count to sustain it is sufficient for not encumbering the record with a discussion of the evidence applicable to this count and law, of fully violating orders, equal means of knowledge, and safety, risks assumed and changed conditions cited by appellee

and applicable to this count.

Under the three statutory counts it is argued that even if the mining statute was by appellee violated, there is no showing that the violation was the proximate cause of the injury. The proximate cause is not necessarily the beginning but the efficient cause, such a cause in the absence of proof of which the court would say as a matter of law the injury would not

have occurred.



If the court is to say as a matter of law what is and what is not the proximate cause there must be absolutely no showing that the violation of the statute had anything to do with the injury. This for the reasons given under each count of the declaration is a question of fact and the jury's finding on the same for the same reasons we refuse to disturb.

Appellant in its brief <sup>covers</sup>/considerable space in citation of law which upon examination we conclude was cited more particularly as we have said upon liability under fourth count. The wilful violation of a statute is nothing more than a conscious violation thereof and that determined from all the facts and circumstances in evidence.

Appellant complains that the court did not give one instruction which read, as follows:

"The Court instructs the jury that if you believe from the evidence that the plaintiff knew the roof in his working place was loose and liable to fall and injure him, and that knowing this continued to work under such dangerous roof and was injured in consequence thereof, then you should find the defendant not guilty as to the fourth count of the plaintiff's declaration.

Appellant's injury, if any, in the Court's refusal to give this instruction could only arise under the fourth count the common law count based upon an assurance of safety. The instruction was properly refused because it ignored the examination of the mine manager, his assurances of safety and the principle of law that although appellee may have known there was some danger, yet if the danger was not such that an ordinarily prudent person would refuse to work, then he might continue.

The refusal of this instruction could not be reversible

if the court is to say as a matter of law that what is not the proximate cause there must be shown that the violation of the statute had anything to do with the injury. This for the reasons given under each count of the declaration is a question of fact and the jury's finding on the same for the same reasons we refuse to disturb. Appellant in its brief <sup>cover</sup> considerable space in citation of law which upon examination we conclude was cited more partially as we have said upon liability under fourth count. The willful violation of a statute is nothing more than a conscious violation thereof and that determined from all the facts and circumstances in evidence. Appellant complains that the court did not give one instruction which read, as follows:

"The Court instructs the jury that if you believe from the evidence that the plaintiff knew the tool in his working place was loose and liable to fall and injure him, and that knowing this continued to work under such dangerous tool and was injured in consequence thereof, then you should find the defendant not guilty as to the fourth count of the plaintiff's declaration.

Appellant's injury, if any, in the Court's refusal to give this instruction could only arise under the fourth count and common law count based upon an assurance of safety. The instruction was properly refused because it ignored the examination of the mine manager, his assurances of safety and the principle of law that although appellee may have known of some danger, yet if the danger was not such that an ordinarily prudent person would refuse to work, then he might continue. The refusal of this instruction could not be reversed.

error because in appellant's eighth and ninth given instructions are practically given the same law as asked for in the refused instruction. Finally this instruction applied to fourth count of declaration only and as we have decided there was evidence sufficient to support the verdict and judgment under the statutory counts the refusal of this instruction becomes immaterial.

We find no reversible error in this record and the judgment will be affirmed.

Affirmed.

#####

(Not to be reported in full.)

error because in appellant's eighth and ninth instructions are practically given the same law as asked for in refused instruction. Finally this instruction applied to count of desertion only and as we have decided there is evidence sufficient to support the verdict and judgment under statutory counts the refusal of this instruction becomes a reversible error.

We find no reversible error in this record and the judgment will be affirmed.

Affirmed.

RECEIVED

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court  
at Mt. Vernon, this 28th day of July,  
A. D. 1914.

Clerk of the Appellate Court

# OPINION

See §

1304

1257

*Opinion of the Appellate Court*

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

- Hon. Harry Higbee, Presiding Justice.
- Hon. James C. McBride, Justice.
- Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff

And afterwards in Vacation, after said March term, to-wit: On the 27th day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

~~ERROR TO~~  
APPEAL FROM

Huback

188 I.A. 345

vs.

Circuit

COURT

No. 25

March Term, 1911.

Madison

COUNTY

Huback RR Co  
et al

TRIAL JUDGE

Hon. Geo. A. Crow





Term No. 25.

Page 23. 4.

March Term, A. D. 1914.

|                         |   |                  |
|-------------------------|---|------------------|
| John Huback,            | ) |                  |
|                         | ) |                  |
| Appellee,               | ) | Appeal from      |
| vs.                     | ) | Circuit Court of |
|                         | ) | Madison County.  |
| Wabash Railroad Company | ) |                  |
| and Illinois Terminal   | ) |                  |
| Railroad Company,       | ) |                  |
| Appellants.)            | ) |                  |

Opinion by Harris, J.

1387A 345

This suit was brought by appellee against appellants to recover damages for personal injuries.

The declaration filed consisted of two counts which in substance alleged: That on November 6, 1911, and prior thereto, the defendant the Wabash Railroad Company, was possessed of certain railroad, extending through and within a part of the city of Edwardsville, Madison County, which crossed High Street in said city and which the defendants, Wabash Railroad Company and Illinois Terminal Railroad Company were jointly using and operating; that defendant Wabash Railroad Company was possessed of a certain engine and train of two coaches which were being operated by the defendants, jointly, and defendants jointly were had in charge of said train, as conductor, Philip Zimmerscheid; that plaintiff (here appellee) was a joint servant of said defendants working as a brakeman on said train under the orders of said Philip Zimmerscheid; that defendant required and said train was run backward with coaches in front of engine along said railroad toward said High Street crossing and plaintiff as a brakeman, was required by defendants to and did ride on the front platform of the first coach of said train as said train was being

March Term, A. D. 1914.

John Hubert, Appellee,  
vs.  
Wabash Railroad Company  
and Illinois Terminal  
Railroad Company,  
Appellants.

Appeal from  
Circuit Court of  
Madison County.

1914

Opinion by Harris, J.

This suit was brought by appellee against appellants to recover damages for personal injuries. The declaration filed consisted of two counts. The substance alleged: That on November 6, 1911, and prior to that time, the defendant the Wabash Railroad Company, was operating a certain railroad, extending through and within a part of the city of Edwardsville, Madison County, which crossed the street in said city and which the defendants, Wabash Railroad Company and Illinois Terminal Railroad Company were jointly and severally operating; that defendant Wabash Railroad Company was operating of a certain engine and train of two coaches which were operated by the defendants, jointly, and defendant John Hubert had in charge of said train, as conductor, while the engine and that plaintiff (here appellee) was a joint servant of said defendants working as a fireman on said train under the direction of said Philip Zimmermann; that defendant required and said train was run backward with coaches in front of engine and coaches railroad toward said High Street crossing and plaintiff as a fireman, was required by defendants to and did ride on the rear platform of the first coach of said train and said train was

run, and there sound an air whistle as said train approached the crossing aforesaid.

That the engine and each of said coaches for the purpose of stopping same was equipped with air brakes which could be operated and set by a certain lever at the railing on the platform on said coach upon which plaintiff was riding, as aforesaid, and that when said brakes were in reasonably safe condition and repair the said train, when running at the rate of 15 miles per hour could be stopped quickly within a distance of 120 feet, by throwing or setting of said brakes in emergency by means of the lever aforesaid; that the defendants negligently failed to use reasonable care to keep said air brakes in reasonably safe condition and repair and negligently permitted the same to be and remain out of repair and in an unsafe condition for use, in this that the piston in each of the brakes upon said coaches had too much travel, namely ten inches of travel when the piston should have not to exceed six inches of travel so that the air brakes when thrown or set in emergency, by means of the lever aforesaid, would not act with sufficient power nor quickness to stop said train quickly, and the said train when running at the rate of 15 miles per hour could not be stopped in a less distance than 300 feet, all of which was well known or in the exercise of reasonable care, could have been known to defendants and of which plaintiff was ignorant. By means whereof on said day, while the said train was being operated backward along said railroad at the rate of 15 miles per hour toward said High Street crossing, and while the plaintiff in the scope of his employment and in the exercise of due care for his own safety was riding on the foremost platform of said train, when a certain team and wagon were being driven across said crossing, and when in order to avoid said train striking said

run, and there sound an air whistle as it crosses the crossing aforesaid.

That the engine and each of said coaches for the purpose of stopping same was equipped with air brakes which were operated and set by a certain lever at the rear of the train on said coach upon which plaintiff was riding, and that when said brakes were in reasonably safe condition and repair the said train, when running at the rate of 15 miles per hour could be stopped quickly within a distance of 120 feet, by throwing or setting of said brakes in emergency by means of the lever aforesaid; that the defendant failed to use reasonable care to keep said air brakes in a safe and reliable condition and repair and negligently permitted the same to be and remain out of repair and in an unsafe condition for use, in this that the piston in each of the brakes upon the coaches had too much travel, namely ten inches of travel, and the piston should have not to exceed six inches of travel; that the air brakes when thrown or set in emergency, or by means of the lever aforesaid, would not act with sufficient not quickness to stop said train quickly, and the said train when running at the rate of 15 miles per hour could not be stopped in a less distance than 300 feet, all of which was well known or in the exercise of reasonable care, could have been known to defendants and of which plaintiff was ignorantly means whereof on said day, while the said train was being operated backward along said railroad at the rate of 15 miles per hour toward said high street crossing, and while the said train for his own safety was riding on the foremost coach of said train, when a certain team and wagon were being driven on said crossing, and when in order to avoid said train and wagon

team and wagon it became necessary to stop said train quickly and within a distance of 230 feet and the plaintiff for that purpose threw and set said air brakes in emergency, by means of the lever aforesaid, by reason of the negligence of the defendants and the unsafe condition and repair of said air brakes aforesaid the said air brakes failed to act properly and effectively and failed to stop said train within the distance of 230 feet and the said train ran and struck with great force and violence against said team and wagon, and thereby plaintiff was thrown with great force and violence from the foremost flat form and coach upon which he was riding to the ground, his skull fractured, and he was permanently injured, his right arm and hand permanently injured and disfigured and he was otherwise permanently injured in body and limb to the damage of \$15,000.00.

A plea of general issue filed, a trial had, and verdict of jury finding issues for plaintiff, damages \$7,500.00. Motion for new trial overruled; judgment on verdict and award to this court. The credibility of the witnesses in this case has been argued at some length, but from an examination of the record and the opportunity of trial court to observe and hear upon their credibility we accept the judgment of court and jury upon this branch of the case as final. The facts involved in this case appear that appellee, 27 years of age on November 6, 1911, was and had been for about six weeks prior thereto a brakeman upon the train in question. That prior to this employment he had been employed as brakeman on freight trains. That he was a strong and able-bodied man. That the defendants jointly operated the train in question consisting of an engine and two coaches between Edwardsville and Alton and Edwardsville

team and wagon it became necessary to stop said train  
 and within a distance of 150 feet and the plaintiff  
 purpose threw and set said air brakes in emergency  
 the lever also said, by reason of the negligence of the  
 ants and the unsafe condition and repair of said air  
 also said the said air brakes failed to set properly  
 lectively and failed to stop said train within the distance  
 230 feet and the said train ran and struck with great force  
 violence against said team and wagon, and thereby  
 thrown with great force and violence from the tracks, the  
 form and coach upon which he was riding to the ground, his  
 skull fractured, and he was permanently injured, his right  
 and hand permanently injured and disfigured and he was otherwise  
 wise permanently injured in body and limb to the damage of  
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A plea of general issue filed, a trial had, and verdict  
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 in this case appear that appellee, 27 years of age, a  
 6, 1911, was and had been for about six weeks prior thereto  
 brakeman upon the train in question. That prior to this  
 employment he had been employed as brakeman on freight trains.  
 That he was a strong and able-bodied man. That the train  
 jointly operated the train inspection consisting of an engine  
 and two coaches between Edwardsville and Alton and Edwardsville

and Edwardsville Junction where they connected with line 5 of the Wabash. The Junction is about two miles north of Edwardsville depot of appellants. The train run head on from Edwardsville to the Junction and returned with coaches head of engine driven backward. Appellee was required to ride on the return trip on the foremost platform of the front coach in the train as it proceeded southward from the Junction to Edwardsville and to sound an air whistle as a warning when the train approached street crossings, and apply the air brakes when required.

The engine and coach were equipped with Westinghouse air brakes having 12 inch brake cylinders, which hung under the center of each coach and beneath the engine. The tail hose of the train pipe line controlling the air brakes hooked over the railing of the platform on which appellee was required to ride, and this tail hose was provided with two angle cocks or levers, one of which was used by appellee in sounding the air whistle, and the other to apply air brakes which could be applied from platform of this coach as well as from the engine. Appellee had made one service application of the brakes prior to the one in question. He had the day previous observed the piston travel of the brakes and noticed that they ran out a distance of nine or ten inches when the brakes were applied by the engineer at the depot in Edwardsville, but appellee says he did not know at that time what the piston travel had to do with the proper operation of the brakes, and that he did not know anything about the adjustment of air brakes nor what was a proper piston travel. That a proper piston travel is from five to six inches. When the piston travel exceeds eight inches the brakes

and Adwardsville Junction where they connected at  
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the return trip on the foremost platform of the train  
the train as it proceeded southward from the Junction  
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when required.

The engine and coach were equipped with Westinghouse  
brakes having 12 inch brake cylinders, which hung under the  
center of each coach and beneath the engine. The train  
the train pipe line controlling the air brakes hooked over the  
railing of the platform on which appellee was required to stand,  
and this tail hose was provided with two angle cocks or valves,  
one of which was used by appellee in sounding the air whistle,  
and the other to apply air brakes which could be applied from  
platform of this coach as well as from the engine. Appellee  
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operation of the brakes, and that he did not know anything about  
the adjustment of air brakes nor what was a proper piston  
travel. That a proper piston travel is from five to ten  
inches. When the piston travel exceeds eight inches the train



ing force is destroyed. That appellee had never applied the brakes in emergency previous to the accident. That appellee had at the time of the accident an inspector of cars, name of Cummings, who performed his duties at the Junction and every day looked over the coaches in this train and if the brakes on these cars were out of order he was supposed to repair them. He inspected the coaches and brakes about nine o'clock of the morning of the accident. He had about 25 years' experience in inspecting cars and brakes of cars. He says he examined the brakes the next morning after accident, measured, the piston travel and found it to be <sup>about</sup> six inches and brakes not in need of repair. Witness Schmidt says as a locomotive fireman he is familiar with air brakes, and that he noticed these brakes three or four days before accident and on evening of accident that they were not in proper adjustment and that the piston travel was about nine to ten inches.

Appellee the afternoon of November 6, 1911, was upon this train as heretofore described, equipped as before stated, approaching the High Street crossing, a street running in an easterly and westerly direction. Across High Street toward the north and immediately west and parallel to appellant's main track is a switch track known as mill track; located at the northwest corner of the intersection of mill track with High Street is a building 165 to 170 feet long called the warehouse or cooper shop, and on the other side of High Street and opposite the warehouse is another building known as the mill building, except about 22 feet immediately south of High Street, this building extends to next street, South College Street. On the afternoon in question appellee says, as we approached High Street crossing looking south he noticed a team of mules when they approached crossing from behind warehouse. The train was



about the north end of the warehouse to 200 feet from the south end when discovered is the evidence of some of the other eye witnesses. That the location of the eye witnesses and their opportunity for seeing gives rise to a difference of opinion as to distance from High Street at which air was applied, consequently the difference of opinion as to the effects of the application.

The appellant's argument upon their assignment of error is confined to four propositions.

First: That the preponderance of evidence does not prove that the brakes were defective or that such condition was the proximate cause of the accident.

Second: If the brakes were defective appellee is charged with knowledge of it, and assumed the risk of injury resulting from their operation.

Third: Assuming brakes were out of repair or defective at the time of the accident, appellants had no notice of such condition as would render them liable to appellee.

Fourth: That appellant was entitled to a new trial on the ground of newly discovered evidence.

Appellant upon the question of preponderance of the evidence discusses in detail the evidence of the different witnesses, their credibility, experience and knowledge of the subject about which they were testifying. The court will see, where there is a contrariety of evidence, after an examination of the record, determine as a mathematical proposition where the preponderance lies, that being within the province of the jury. There was in this case sufficient evidence from all angles upon whether or not the brakes were defective and whether such defect was the cause of injury to make it a question for

about the north end of the warehouse is at least 100 feet. When discovered is the evidence of none of the eye witnesses and necessities. That the location of the eye witnesses and necessities for hearing gives rise to a difference of opinion as to the distance from High Street at which air was blown, and consequently the difference of opinion as to the effect of the explosion.

The appellant's argument upon their assignment of error is confined to four propositions. First: That the preponderance of evidence does not show that the brakes were defective or that such condition was the proximate cause of the accident.

Second: If the brakes were defective as charged with knowledge of it, and assumed the risk of injury resulting from their operation.

Third: Assuming brakes were out of repair or defective at the time of the accident, appellants had no notice of such condition as would render them liable to appellee.

Fourth: That appellee was entitled to a new trial on the ground of newly discovered evidence.

Appellant upon the question of preponderance of evidence discusses in detail the evidence of the different witnesses, their credibility, experience and knowledge of the facts about which they were testifying. The court will not where there is a contrariety of evidence, after an examination of the record, determine as a mathematical proposition where the preponderance lies, that being within the province of the jury. There was in this case sufficient evidence to enable the jury upon whether or not the brakes were defective and whether such defect was the cause of injury to make it a question for the jury.

the jury, and unless the verdict of the jury is against the manifest weight of the evidence it will not be set aside. With this we are satisfied on this proposition.

The second proposition, knowledge of appellee of defect and assumption of risk. These are questions of fact to be determined by jury as other questions of fact. It is true in this State under the rule of law that appellee in actions of this kind must show due care and under this rule a servant must prove by a preponderance of evidence the following propositions:

First: The existence of some defect in the construction or operation of the air-brake which rendered it inefficient in doing the work required.

Second: That appellants in the exercise of ordinary care would have or could have had knowledge of such defect; or

Third: That appellee did not know of the defect and did not have equal opportunities with appellants of knowing it. (See Erie & Western Railroad Co. vs. Wilson, 189 Ill., 89. Chicago & North Western Machine Co. vs. Zakzewski, 200 Ill., 522.)

The rule in this state is in actions for personal injury that the plaintiff must allege and prove that he was free from negligence contributory to the injury. It is true that to charge the servant with negligence he must not only know or have the means of knowing by the exercise of ordinary care of the defect, but must also know that the defect renders the appliance unsafe to use, and he is not bound to make an investigation for latent defects. Where want of knowledge is not susceptible of direct proof it may be inferred from circumstances and the appellee may be aided by the presumption that a person does not voluntarily incur danger or the risk of death. Knowledge or want of knowledge of a defect may be inferred from

the jury, and unless the verdict of the jury is manifest weight of the evidence it will not be set aside with this we are satisfied on this proposition.

The second proposition, knowledge of an officer of fact and assumption of risk. There are questions of fact to be determined by jury as other questions of fact. It is in this State under the rule of law that applied in actions of this kind must show due care and under this rule a person must prove by a preponderance of evidence the following propositions:

First: The existence of some defect in the machinery or operation of the air-brake which rendered it inefficient in doing the work required.

Second: That a plaintiff in the exercise of ordinary care would have or could have had knowledge of such defect; and

Third: That appellee did not know of the defect and did not have equal opportunities with appellants of knowing of the defect. *Wrie & Western Railroad Co. vs. Wilson*, 188 Ill., 491, 492.

*Machine Co. vs. Laksewski*, 200 Ill., 500.

The rule in this state is in actions for personal injury that the plaintiff must allege and prove that he was injured from negligence contributory to the injury. It is not enough to charge the servant with negligence he must not only know he have the means of knowing by the exercise of ordinary care the defect, but must also know that the defect rendered the appliance unsafe to use, and he is not bound to make an inspection for latent defects. Where want of knowledge is not manifestly of direct proof it may be inferred from circumstances and the appellee may be aided by the presumption that a person does not voluntarily incur danger or the risk of injury. Knowledge or want of knowledge of a defect may be a factor.

the circumstances but by whatever evidence the facts are shown, the burden of proof in that regard rests on the plaintiff. (Swift & Co. vs. Gaylord, 229 Ill., 330.)

The servant is under no primary liability to investigate for latent defects to test the fitness and safety of the fixtures or appliances provided him by the master. He presumes that they are fit and safe, and though the circumstances may be such a servant is chargeable with knowledge of such defects as are patent and obvious and of such defects as in the exercise of ordinary care he ought to have knowledge of. A servant is not to be deemed as having notice or knowledge of such defects and insufficiencies as can be ascertained only by investigation and inspection for the purpose of ascertaining that there is no danger. (Armour vs. Brazeau, 191 Ill., 117.)

While there is no absolute duty to keep appliances in a safe condition there is a duty to use reasonable care to keep them fit, and this duty may require inspection at certain intervals and the employment of such tests as will reveal the condition of the machinery or appliances. This duty of inspection rests upon the employer and not upon the employee and depends upon the character of the machinery or appliances, since ordinary care may require an inspection oftener in one case than in another. (Armour vs. Brazeau, 191 Ill., 117. Wrisley Co. vs. Burk, 203 Ill., 250.)

While it is true that an employee assumes such risk of his employment as is usually incident thereto and of the extraordinary hazards of which he has notice, or which in the usual exercise of his faculties he ought to have notice, he does not take the risk or dangers known to the master which can be avoided by him in the exercise of reasonable care. He assumes the

the circumstances but by whatever way the truth is shown, the burden of proof in that regard rests on the defendant.

Ill. (Swift & Co. v. Gafford, 232 Ill., 1907.)

The servant is under no primary liability to test for latent defects to test the fitness and safety of fixtures or appliances provided him by the master. It is well known that they are fit and safe, and though the master may be such a servant is chargeable with knowledge of defects as are patent and obvious and of such defects as exercise of ordinary care he ought to have known of. A servant is not to be deemed as having notice or knowledge of such defects and insufficiencies as can be ascertained by investigation and inspection for the purpose of ascertaining that there is no danger. (Armour v. Brzezniak, 191 Ill., 1907.)

While there is no absolute duty to keep machinery in safe condition there is a duty to use reasonable care to keep them fit, and this duty may require inspection at regular intervals and the employment of such tests as will reveal the condition of the machinery or appliances. This duty of inspection rests upon the employer and not upon the employee, depends upon the character of the machinery or appliances, since ordinary care may require an inspection of every case than in another. (Armour v. Brzezniak, 191 Ill., 1907.)

Witelsky Co. v. Park, 203 Ill., 1907.

While it is true that an employee assumes such risk of employment as is usually incident thereto and of the extent of any hazards of which he has notice, or which in the nature of case of his facilities he ought to have notice, he is not to take the risk or dangers known to the master when the exercise of reasonable care by him in the exercise of reasonable care.



risk more or less hazardous of the service in which he is engaged, but he has a right to presume that all proper attention shall be given to his safety and that he shall not be carelessly and needlessly exposed to risks not necessarily resulting from his occupation, and preventable by ordinary care and precaution on the part of his employer. (Alton Laving Brick Co. vs. Hudson, 176 Ill., 270.)

The evidence in this case upon knowledge of a defect and assumption of risk was sufficient to make it a question for the jury and it was properly submitted.

The third proposition that if brakes were out of repair or defective at time of accident there is a failure to give notice of such condition as would make appellants liable.

Notice of a condition may not be capable of direct proof and is not required. Notice may be proven by facts and circumstances which facts and circumstances the master has a duty of or an opportunity to have knowledge of which is not open to the servant, as in this case an inspector who had already one day inspected these brakes for latent defects and such inspection held to a knowledge of how such defects affected the service. A duty to inspect and test for defects that would not be chargeable to the servant who had only to do with the application. While the master is not charged with an absolute duty to keep appliances safe he is charged with the duty to use reasonable care to keep them fit and reasonably safe for service.

The extent of that duty and what would be a faithful performance depends upon the character of the machinery or appliances since reasonable care may require inspection oftener in one case than in another. (Wrisley Co. vs. Burke, 203 Ill., 201.)

risk more or less hazardous of the servant but he has a right to presume that all proper care will be given to his safety and that he shall not be needlessly exposed to risks not necessarily resulting from his occupation, and preventable by ordinary care and the part of his employer. (Alton Traction Co. v. Alton, 111 Ill. 270.)

The evidence in this case upon knowledge of defective condition of risk was sufficient to make it a question for the jury and it was properly submitted. The third proposition that if brakes were out of repair defective at time of accident there is a failure to exercise due care of such condition as would make appliances liable. Notice of a condition may not be capable of direct proof and is not required. Notice may be proven by facts and circumstances which facts and circumstances the master has or an opportunity to have knowledge of which is not open to the servant, as in this case an inspector who had been daily inspected these brakes for latent defects and was held to a knowledge of how such defects reflected on the ice. A duty to inspect and test for defects that would be chargeable to the servant who had only to do with the machine. While the master is not charged with an absolute duty to keep appliances safe he is charged with the duty to exercise due care to keep them fit and reasonably safe for service. The extent of that duty and what would be required of him depends upon the character of the machinery or appliances since reasonable care may require inspection of one case than in another. (Whitely Co. v. Lumber Co., 111 Ill. 270.)

Appellants in this case recognized this duty to the extent of having witness Cummings inspect these brakes every day for a period of time. It was not presumed that appellee was not familiar with the defect. Whether or not this inspector was competent and whether or not his duty and whether appellants exercised reasonable care in the performance of its duty were questions of fact determined by the jury. Appellants contend that they were entitled to a new trial on ground of newly discovered evidence; from the examination of the affidavits, there was no showing of any error in the evidence and the evidence would have been cumulative. There was no abuse of discretion in overruling the motion for new trial.

There is no reversible error in this record and the judgment will be affirmed.

Affirmed.

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(Not to be reported in full.)

Appellants in this case recognized that by the time they had  
having witness Cummings inspect these pieces of evidence  
defect that appellee was not presumed to be innocent  
whether or not this inspector was competent and held  
duty and whether appellants exercised reasonable care  
performance of its duty were questions of fact for the  
the jury. Appellants contend that they were entitled to  
trial on ground of newly discovered evidence; from the  
ation of the affidavits, there was no showing of  
and the evidence would have been cumulative. There  
of discretion in overruling the motion for new trial.  
There is no reversible error in this record and  
ment will be affirmed.

11700.

WARRANT

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court  
at Mt. Vernon, this 27th day of July.

A. D. 1914

A. C. Millspaugh

Clerk of the Appellate Court

# OPINION

see §

1305-1251  
A 375  
*Opinion of the Appellate Court*

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff

And afterwards in Vacation, after said March term, to-wit: On the 26th day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

~~ERROR TO~~  
APPEAL FROM

188 I.A. 243

Circuit

COURT

Crawford

COUNTY

TRIAL JUDGE

Hon.

E. E. Neuman

Mantgamery  
et al

No. 28 vs.

March Term, 1914.

Atickok  
et al





Term No. 28.

Agenda No. 9.

March Term, A. D. 1914.

Samuel R. Montgomery, Alice  
Montgomery and Herman Mont-  
gomery,

Vs.

Appellees,

Appeal from  
Circuit Court of  
Crawford County.

O. Hickok, W. C. Turner, Fred  
Zeigler, D. E. Jones, J. W.  
White and W. E. Stathers,

Appellants.)

1881A.348

Opinion by Harris, J.

Suit in assumpsit was brought by appellees to recover from appellants the sum of One thousand Dollars alleged to be due from appellants upon an oil and gas lease. The amended declaration consisted to two counts. The first count declaring upon said lease, and setting it out verbatim, and also alleging that appellants by various assignments and conveyances became the owners of said lease as a copartnership under name of Bess Oil Company and that said company, pursuant to the terms and conditions of said lease drilled a well on said lands which said well when completed was a paying oil well and by means of whereof appellants became indebted to appellees in sum of Two thousand Dollars and thereafter on July 2nd, 1909, paid to appellees the sum of One thousand Dollars on said debt.

The second count of said amended declaration was the consolidated common counts with statements of account sued on. The appellants J. W. White, W. C. Turner and W. E. Stathers, each, for himself, files the plea of general issue, verified plea denying joint liability, and plea of statute of frauds. That afterwards appellees file two additional counts. The first additional count alleging ownership of land in Samuel R. Montgomery, the execution of the lease by appellees to Fred D. Zeigler,

March Term, A. D. 1914.

Appeal from  
Circuit Court of  
Crawford County.

Samuel H. Montgomery, Alice  
Montgomery and Herman Mont-  
gomery,  
Appellees,  
Vs.  
O. Hickok, W. C. Turner, Fred  
Ketler, D. W. Jones, L. W.  
White and W. E. Stathers,  
Appellants.

1881 A. 348

Opinion by Harris, J.

But inasmuch as was brought by appellee to recover

from appellants the sum of one thousand dollars alleged to be

due from appellants upon an oil and gas lease. The amended

declaration consisted to two counts. The first count de-clar-

ing upon said lease, and setting it out verbatim, and also al-

leging that appellants by various assignments and conveyances

became the owners of said lease as a copartnership under name

of Hess Oil Company and that said company, pursuant to the terms

and conditions of said lease drilled a well on said land which

said well when completed was a paying oil well and by reason ex-

whereof appellants became indebted to appellees in sum of Two

thousand dollars and thereafter on July 2nd, 1902, said appel-

lees the sum of one thousand dollars on said debt.

The second count of said amended declaration was the con-

solidated common counts with statements of account rendered by

appellees J. W. White, W. C. Turner and L. E. Stathers, each,

for himself, files the plea of general issue, verified pleas

denying joint liability, and plea of statute of limitations.

Afterwards appellees file two additional counts. The first

additional count alleging ownership of land in annual

and the execution of the lease by appellees to land

the covenant of Fred Zeigler for himself, his successors, heirs, executors, administrators and assigns to pay two thousand dollars in case the first well drilled should be a paying oil and gas well, the assignment by Zeigler to appellants Mickok, Turner, Jones, White and Stathers of certain interests in leases; that all appellants jointly took possession and jointly as owners and copartners drilled a well which when completed was a paying oil and was the first well drilled pursuant to the terms and conditions of said lease, whereupon appellees became indebted to appellants in sum of two thousand dollars, of which said sum appellants did afterwards pay to appellees the sum of one thousand dollars.

The second additional count being on motion of appellees and by leave of court withdrawn is immaterial on the appeal.

The appellees file a bill of particulars in said cause. Appellants refile their pleas and appellees demur to pleas one, two and three, which demurer was overruled. Appellees file replications to said pleas. By agreement a jury was waived and a trial of said cause by the court. The suit at the conclusion of the introduction of evidence was dismissed as to defendant Fred Zeigler on appellees' motion.

The Court found the issues in favor of appellees and against defendants G. Mickok, W. C. Turner, C. L. Jones, J. W. White and J. E. Stathers in the sum of One thousand dollars damages and upon the finding entered judgment in favor of appellees and against W. C. Turner, J. W. White and W. A. Stathers for the sum of One thousand dollars and costs of suit, the defendants of whom the court had jurisdiction, and on appellees' motion ordered scire facias to issue against defendants

the government of Fred Reigler for himself, his executors, administrators and assigns to pay two hundred dollars in case the first well drilled should be dry. The assignment by Reigler to appellants White and Jones, White and Stathers of certain interests in the land that all appellants jointly took possession and jointly owned and co-owners drilled a well which when completed was paying oil and was the first well drilled pursuant to the terms and conditions of said lease, whereupon appellants became indebted to appellees in sum of two thousand dollars, of which said sum appellants did afterwards pay to appellees the sum of one thousand dollars.

The second additional count being an action of assumpsit and by leave of court withdrawn is amended on the second day of the month of April, 1914, as follows: The appellees file a bill of particulars in said count. Appellants reply their pleas and appellees demur to the same. Two and three, which demurer was overruled. A plea of assumpsit is filed. By agreement a jury was impaneled. A trial of said cause by the court. The suit at the conclusion of the introduction of evidence was dismissed on the motion of Fred Reigler on appellees' motion.

The Court found the issues in favor of appellees and against defendants C. Hickok, W. C. Turner, J. E. Jones, J. E. White and J. E. Stathers in the sum of one thousand dollars damages and upon the finding entered judgment in favor of appellees and against W. C. Turner, J. E. White and J. E. Stathers for the sum of one thousand dollars and costs of suit. Defendants of whose the court had jurisdiction, and on appeal, motion ordered set aside to leave against them the sum of one thousand dollars.

G. Hickok and D. E. Jones to show cause why they should not be made parties to the judgment; to these rulings and judgment of the Court appellants W. C. Turner, J. W. White and A. J. Stathers except and bring this appeal.

The appellees on the 5th day of September, 1907, executed and delivered to W. D. Zeigler a lease to the Northeast quarter of the Southeast quarter of Section 15, Township 5 North, Range 11 West, containing 40 acres more or less, situated in Township of Montgomery, County of Crawford, State of Illinois, waiving all rights under Homestead Exemption laws; consideration One Dollar, in hand paid by second party, and of the covenants and agreements hereinafter contained on part of the party of second part to be paid, kept and performed, does demise, lease and let to second parties, successors or assigns, for sole and only purpose of mining and operating for oil and gas laying pipe lines, constructing tanks, buildings and other structures to take care of said product; that lease should remain in force for ten years from date and as long thereafter as oil or gas is produced therefrom by second party, successors or assigns. Provided party of second part, successors or assigns upon the payment of one dollar to parties of first part, heirs or assigns may surrender said lease for cancellation thereby all payments and liabilities shall cease. All covenants and agreements between the parties therein contained to extend to their heirs, executors, administrators, successors and assigns.

Among the covenants and agreements of second party therein contained are the following;

1st. To deliver to first parties in pipe line free of cost the equal one-sixth part of all oil produced and saved on said premises.

U. S. District Court for the District of Columbia, in the case of  
the Court appoints W. C. Turner, J. W. White and J. W. ...  
ers except and bring this appeal.

The appellees on the 5th day of September, 1907, executed  
and delivered to E. D. Keltner a lease to the Northeast ...  
of the Southeast Quarter of Section 15, Township 3 North, Range ...  
11 West, containing 40 acres more or less, situated in Town-

ship of Montgomery, County of Crawford, State of Illinois, with-  
ing all rights under Homestead Exemption laws; consideration  
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and agreements hereinafter contained on part of the party of  
second part to be paid, kept and performed, does devise, lease  
and let to second parties, successors or assigns, for sole and

only purpose of mining and operating for oil and gas having  
pipe lines, connecting tanks, buildings and other structures  
to take care of said product; that lease should remain in force  
for ten years from date and as long thereafter as oil or gas

is produced therefrom by second party, successors or assigns.  
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heirs, executors, administrators, successors and assigns.  
Among the covenants and agreements of second party therein

contained are the following:  
1st. To deliver to first parties in pipe line lines  
cost the equal one-sixth part of all oil produced and a ...  
said premises.

2nd. To pay for gas produced and furnished first parties gas free of charge for home consumption.

3rd. To pay for gas produced from oil well. To complete a well within sixty days or pay at rate of \$25.00 per month in advance for each month completion is delayed. That the completion of five wells shall be and operate as a full liquidation of all rent under this provision during the remainder of term of this lease. The right to withdraw machinery and castings at any time to second party.

4. Second party agrees to place rig on lease within thirty days etc. Second party agrees to pay first party when stake is set for first well the sum of \$400.00 and two thousand dollars additional in case first well is paying well.

That under the different assignments offered in evidence Zeigler had assigned to "C. Turner, T. W. White, O. Hickok, D. E. Jones and W. E. Stathers in September and October, 1907, and they had accepted said assignments subject to the terms and conditions thereof.

That in December, 1907, the said parties entered upon a 10 described land under said lease and commenced the drilling of an oil well, completing the same in February, 1908. That after the completion of the well and before July 1, 1909, Beecher & Harrington bought the interest of Hickok. That about July 1, 1909, the several parties paid in proportion to their interest on this \$2,000.00 due on first well the sum of one thousand dollars, Beecher & Harrington paying in place of Hickok.

The appellants urge under their assignment of errors six reasons for the reversal of this judgment.

First: They are not parties to the lease and by the assignments to them they did not assume and agree to keep and

2nd. To pay for gas produced and furnished first

gas free of charge for home consumption.

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4. Second party agrees to place rig on lease within thirty days etc. Second party agrees to pay first party when rig is set for first well the sum of \$400.00 and two thousand etc.

and additional in case first well is paying well.

That under the different assignments offered in evidence Keltner had assigned to "C. Turner, J. W. White, Q. Hickok, D. E. Jones and W. E. Starnes in September and October, 1907, and they had accepted said assignments subject to the terms and conditions thereof.

That in December, 1907, the said parties entered upon said described land under said lease and commenced the drilling of an oil well, completing the same in February, 1908. That after the completion of the well and before July 1, 1909, Keltner & Harrington bought the interest of Hickok. That about July 1, 1909, the several parties paid in proportion to their interest on this \$2,000.00 due on first well the sum of one thousand

dollars, Keltner & Harrington paying in place of Hickok.

The appellants urge under their assignment of interest to

reasons for the reversal of this judgment.

First: They are not parties to the lease and by the ar-

assignments to them they did not assume and agree to Keltner



perform any of the covenants and conditions of the lease imposed upon the lessee.

Second: The agreement to pay two thousand dollars in case the first well drilled is a paying well is not a covenant running with the land, and was neither rent nor royalties. That the agreement to pay said sum was an extension of credit by lessors to Zeigler, the lessee.

Third; That the assignment subject to the terms and conditions of this lease does not create a personal liability because it is not a covenant running with the land.

Fourth: Because the agreement to pay two thousand dollars in case the first well is a paying well is the personal covenant of Zeigler and is within the statute of frauds as to appellants and void as to them, and part performance or offer to perform will not remove the bar.

Fifth: If there was a legal liability to pay the two thousand dollars in case the first well was a paying well the evidence does not show the well was a paying well.

Sixth: The defendants to said suit were not partners in the absence of an agreement express or implied and, if any liability exists it is a several liability and not joint.

The first and second reasons argued by appellant is upon the theory that the provision for the payment of the \$2,000.00 upon completion of first well is a personal covenant between lessor and lessee and is not binding upon the assignees of the lessee. The assignees took possession under the lease and drilled the well in question as they had a right to do under the lease and when they did so the Court had a right to presume they elected to accept the provisions of the lease in this regard for the

perform any of the covenants and conditions of the lease imposed upon the lessee.

Second: The agreement to pay two thousand dollars in case the first well drilled is a paying well is not a covenant running with the land, and was neither rent nor royalties. The agreement to pay said sum was an extension of credit by lessors to lessee, the lessee.

Third: That the assignment subject to the terms and conditions of this lease does not create a personal liability because it is not a covenant running with the land.

Fourth: Because the agreement to pay two thousand dollars in case the first well is a paying well is the personal obligation of lessee and is within the statute of frauds as to a written and void as to them, and part performance or offer to perform will not remove the bar.

Fifth: If there was a legal liability to pay the two thousand dollars in case the first well was a paying well, the lessee does not show the well was a paying well.

Sixth: The defendants to said suit were not parties to the lease, and there was no agreement express or implied, and it is not shown that there is a several liability and not joint.

The first and second reasons argued by appellants in support of the theory that the provision for the payment of the \$2,000 upon completion of first well is a personal covenant of the lessor and lessee and is not binding upon the assignees of the lease. The assignees took possession under the lease and the well in question as they had a right to do under the lease and when they did so the court had a right to determine the facts and to accept the provisions of the lease in this regard.

betterment of their holdings thereby enhancing the value of appellees' property. If the covenant between lessor and lessee relates to a thing not in esse but which is yet to be done upon the land tending to enhance its value or to render its enjoyment more beneficial to the owner or occupant the assignees if named are also bound. (Taylor's Landlord and Tenant 9th Ed. Vol. 1, Sec. 260.)

In this case the assignees had the option of proceeding under the lease or not proceeding, electing to proceed they did so as assignees in privity of estate. If the assignees had not elected to proceed and a suit had been instituted for a failure to proceed involving privity of contract a different question might arise. This was a covenant between lessor and lessee, when assigned, accepted by assignees and acted upon by them, that run with the land. This is true whether in the use of terms under this lease you call it rent or bonus. The effect of it was to enhance the value of both owner and assignees' interests in the property in question.

This \$2,000.00 when lease was assigned may have been bonus between lessor and assignees, but when they entered into possession and drilled the well it affected the thing desired and was no longer collateral to the leasehold estate. The holding upon these two propositions are in accord with the holdings in cases cited by appellants including the case of Fisher vs. Guffey, 193 L., 393, which is a case not in point in this case but that suit was based upon the assignment failing to contain the words sufficient to require assignees to pay a personal obligation.

The third and fourth propositions are disposed of by the holding on first and second. That it is a covenant running

24th Dec. Vol. 1, Dec. 1900.)

Under the lease or not proceeding, effecting to proceed, did no as assignee in privy of estate. If the estate had not elected to proceed and a suit had been brought, a failure to proceed involving privy of estate, this question might arise. This was a covenant for years, and lease, when assigned, covenants by assignment and elected to then, that run with the land. This is true in relation to the of terms under this lease you only if you are a party to the effect of it was to finance the value of the owner's interest in the property is essential.

...a personal collision.

holding on first and second. "That is it," he said.

with the land, accepted and acted upon by assignee, was not personal and not an agreement to answer for the debt or obligation of another.

The fifth proposition as a question of fact becomes a question of law because appellants assert that the finding of the trial court that a well producing a sufficient amount of oil to pay operating expenses and some profit is a paying well. That the court should have held that unless the well discovered upon has or would produce oil in such quantities when marketed at current price will pay the cost of drilling, equipping and operating and a reasonable profit to the operator on the land he necessarily expended, it is not a paying well. In the trial no account was taken of drilling and equipping this well. If should there be it is said assignees were taking a chance not to suffer loss if they did not succeed. A chance they were willing to take and the owner was willing to let them have his land and put up with the hazard and inconveniences, to take a chance. If equipment and drilling are to be taken into consideration why not the damages on the other side. The ruling of the Court upon the evidence was the more reasonable and I think the correct theory as to what is and what is not a paying well. That the evidence sustains the finding of the court that the well paid operating expenses and a profit shall be sustained where the finding is not against the manifest weight of evidence. The argument that this should be left to the judgment and good faith of the operator as against the other interested party, unless the contract or lease so provides, seems to be without reason to support it.

The sixth proposition denying joint liability is without merit. The undisputed facts appear that these appeals are, with

With the funds supplied by the United States Government, the National Bureau of Standards was established in 1901 as a part of the Department of Commerce.

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question of law because it is a question of fact whether  
the trial court found a well producing a sufficient amount of  
oil to pay operating expenses and some profit is a question of  
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at current price will pay the cost of drilling, equipment, and  
operating and a reasonable profit to the operator of the well.  
necessarily expended, it is not a paying well. In the  
no account was taken of drilling and equipping this well, and  
should there be it is a paying well. It is a question of fact  
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interested party, unless the contract or lease is properly  
to be without reason to support it.

The sixth proposition denying joint liability is also merit. The undisputed facts suggest that there are no

Jones and Hicock, accepted this lease, entered into possession of the premises, drilled and equipped this well under the name and style of the Hess Oil Company, what the arrangement made between them as to a partnership being immaterial in this case. They held themselves out as a partnership, invited the public to deal with them as such. Appellees did deal with them, permitted them to drill and operate as a partnership, which could not have been done in any other manner. They each contributed and paid a debt due from the partnership and the fact that they had no partnership account should not control when this record is considered there is the further reason that the errors assigned by appellants should not prevail: That the appellants when they accepted the assignment of this lease drilled the well in question and paid one thousand dollars on the amount due they placed a construction upon this contract that it was a covenant running with the land, that the well was a paying one and that the two thousand dollars was due appellees. This construction should and does bind appellants in this case and the judgment will therefore be affirmed.

affirmed.

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( Not to be reported in full.)

Jones and Nicock, accepted this lease, entered into  
of the premises, and assigned this right under the  
and share of the Deas Oil Company, when the parties entered into  
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to deal with them as such. Appellees did deal with them, and  
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assigned by appellees should not prevail. That the assignment  
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well in question and paid one thousand dollars on the installment  
due they placed a construction upon this contract that it was a  
covenant running with the land, that the well was a partnership  
that the two thousand dollars was due appellees. This construction  
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( Not to be reported in full. )



I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court  
at Mt. Vernon, this 26th day of July,  
A. D. 1914.

Clerk of the Appellate Court

# OPINION

1005

1005

1306 1200

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSAUGH, Clerk.

W. S. PAYNE, Sheriff

And afterwards in Vacation, after said March term, to-wit: On the 21st day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Bill, Admx -

~~ERROR TO~~  
APPEAL FROM

188 I.A. 350

No. 39 vs.  
March Term, 1914.

Circuit COURT

Madison COUNTY

E. S. Lewis Sub-  
By C. -

TRIAL JUDGE

Hon. Thos. M. Gatt



March Term, A. D. 1914.

Mary E. Bell, Administratrix of the  
Estate of John Bell, Deceased,  
Appellee,  
vs.  
East St. Louis & Suburban Railway  
Company,  
Appellant.

Appeal from  
Circuit Court of  
Madison County.

1881 A. 350

Opinion by Harris, J.

An action in case brought by appellee against appellant to recover \$10,000.00 damages resulting from the injuring and killing of John Bell, deceased.

The declaration consists of three counts, the first and second counts in substance aver that appellant was, on the 29th day of January, 1913, the owner and operating an electric railway on Main Street in Collinsville, Illinois, carrying passengers for reward, that it became and was the duty of appellant to use reasonable care in running its cars upon and along Main Street to avoid injuring persons who might be traveling along and upon said street in the exercise of due care for their own safety; that appellant so negligently and carelessly operated, controlled and managed one of its cars on Main Street near its intersection with Guernsey Street, that said car was driven upon and against the <sup>car</sup> ~~tem~~ and wagon of appellee's intestate, while in the exercise of due care and caution for his own safety; by reason whereof appellee's intestate, John Bell, received injuries from which he died February 8, 1913. The appointment of appellee ~~appellee~~ administratrix <sup>leaving</sup> surviving appellee his widow and Linnea Bell, daughter, heirs at law and next of kin damages

March Term, A. D. 1914.

Appeal from  
Circuit Court of  
Madison County

Mary L. Bell, Administratrix of the  
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Appellee,  
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1914. A. D. 1914

O pinion by Harris, J.

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ries from which he died February 8, 1913. The appointment of  
appellee ~~administratrix~~ <sup>leaving</sup> surviving appellee his widow  
and Linnie Bell, daughter, heirs at law and next of kin damages

in sum of \$10,000.00.

The second count in addition to formal allegations alleges that appellee's intestate in due care was driving westward on Main Street near the intersection of Guernsey Street, appellant's car approached from the rear with an unobstructed view of said wagon, and through its servants in charge of said car failed to exercise reasonable care to have said car under control as not to run against said team and wagon and thereby carelessly and negligently ran said car against said team and wagon whereby John Bell was violently thrown from said wagon to the ground and received injuries from which he died.

The third count in addition to formal averments alleges wanton and wilful negligence. The court, however, at the conclusion of appellee's evidence instructed the jury to find appellant not guilty under third count.

To this declaration appellant filed plea of not guilty, a trial, case submitted to jury under first and second counts, a verdict in favor of appellee and against appellant for sum of \$5,250.00. Motion for new trial overruled judgment on verdict and this appeal.

Some of the material facts in this case are undisputed and appear in substance as follows:

Main Street in Collinsville, 40 feet wide with the railway track of appellant in center extends in a northeasterly and southwesterly direction; Guernsey street crosses it at right angles. John Bell, appellee's intestate, a man thirty-eight years of age, about three o'clock in the afternoon of January 29, 1913, was driving a mule team hitched to a delivery wagon west on Main Street approaching the intersection of Guernsey Street and

in sum of \$10,000.00.

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Main Street in Collinsville, 40 feet wide with the railway track of appellant in center extends in a northeasterly and southwesterly direction; Guernsey Street crosses it at right angles. John Bell, appellee's intestate, a man thirty-eight years of age, about three o'clock in the afternoon of January 28, 1913, was driving a mule team hitched to a delivery wagon west on Main Street approaching the intersection of Guernsey Street and



when a short distance west of said intersection he was struck by a <sup>a</sup>car of appellant going in the same general direction, the car striking the mules and the left front wheel of his wagon, he was thrown from the wagon and injured, from which injuries he died February 8, 1913.

There is a dispute as to what appellee's intestate was doing just prior to and at time of accident, and what signals, if any, were given by appellant and whether or not the car was under control, and these disputed facts and the law to be applied is the contention between the parties in this court.

In short it is argued by appellant that the trial court should have directed a verdict at close of the evidence and that the verdict is contrary to law and against the greater weight of the evidence. A small amount of space is devoted by appellant objecting to ruling of court admitting evidence, the refusal of one instruction and that the damages are excessive with reference to these objections they are without merit. The evidence objected to was the conclusion of the witness, the instruction was not in form, and the law had been given to the jury in another instruction and if it is a case where appellant is liable the damages were not excessive.

Recurring again to the main contention, parties agree that two of the material allegations of the declaration to be proven by appellee by a preponderance of the evidence are: that appellee's intestate was in the exercise of due care and caution for his own safety.

Second that appellant was careless and negligent in handling and controlling its car and that such carelessness and negligence caused the injury to appellee's intestate.

That there was some evidence upon which a jury might find

when a short distance west of said intersection he was struck by a car of appellant going in the same general direction. The car striking the mules and the left front wheel of the wagon, he was thrown from the wagon and injured, from which injuries he died February 8, 1913.

There is a dispute as to what appellant's intestate was doing just prior to and at time of accident, and as to whether or not the car was under control, and these disputed facts and the law to be applied is the contention between the parties in this court. In short it is argued by appellant that the trial court should have directed a verdict in favor of the evidence that the verdict is contrary to law and against the greater weight of the evidence. A small amount of space is devoted by appellant objecting to ruling of court admitting evidence, the refusal of one instruction and that the damages are excessive with reference to these objections they are without merit. The evidence objected to was the conclusion of the witness, the instruction was not in form, and the law had been given to the jury in another instruction and if it is a case where appellant is liable the damages were not excessive. Recurring again to the main contention, parties agree that two of the material allegations of the petition to be proven by appellee by a preponderance of the evidence are: that appellee's intestate was in the exercise of due care and caution for his own safety. Second that appellant was careless and negligent in running and controlling the car and that such carelessness and negligence caused the injury to appellee's intestate. That there was some evidence upon which a jury might find

both allegations proven and under the law the court committed no error in refusing to direct a verdict.

However, upon the question of the verdict being against the manifest weight of the evidence, the verdict being the result of a consideration of something other than the real issues involved, and not in accord with substantial justice are questions that present themselves on a motion for new trial and to this court on appeal. The consideration of these questions by the trial court on a motion for new trial are governed by a different rule of law than that under consideration in directing or refusing to direct a verdict.

Where a question of fact has been properly submitted to the jury upon motion for new trial is the first time the court becomes responsible in any way for the finding, but when so called upon it becomes the finding of the Court as well as jury. And where the trial court or appellate court are satisfied that the verdict of jury is against manifest weight of the evidence to permit it to stand would mean that great injustice, not only in that particular case, but in all cases where it might be insisted the verdict of a jury should be conclusive no matter what the evidence might be. (Gull vs. Beckstein, 173 Ill., 187; C & A. R. R. Co. vs. Hornrich, 157 Ill., 386; I. C. R. R. Co. vs. Haccher, 110 App., 102.)

Now for a consideration of the facts in this case as they appear from the evidence:

John Bell, a resident of this small town, familiar with its streets and railroad, a driver that brought him in contact with cars and track, driving west on this street and turning his team across track with car coming within 100 feet. This state-

both allegations proven and under the law the court committed no error in refusing to direct a verdict.

However, upon the question of the verdict being against the manifest weight of the evidence, the verdict being the result of a consideration of something other than the real issues involved, and not in accord with substantial justice as questions that present themselves on a motion for new trial and to this court on appeal. The consideration of these questions by the trial court on a motion for new trial are governed by a different rule of law than that under consideration in directing or refusing to direct a verdict.

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Now for a consideration of the facts in this case as they

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John Bell, a resident of this small town, familiar with its streets and railroad, a driver that brought him in contact with cars and track, driving west on this street and turning his team across track with car coming within 100 feet. This state-

ment is made from the evidence that is not contradicted. The  
nules and front wheel of wagon were hit and that is not dis-  
puted by appellee, and this could not have been done had the  
collision occurred from the rear or as deceased was leaving  
track toward north with rear wheels of his wagon skidding as  
claimed by appellee. Three witnesses for appellee are all  
that pretend to give any account of deceased at the time and  
just before the accident. Bardsley Grater and Mrs. Phleger and  
all say he was driving west near center of street and neither  
say they saw him do anything to avoid injury. Other witnesses  
say, who were disinterested, that deceased was driving west a  
safe distance north of track, and went west of intersection of  
Guernsey Street turned his team across street.

These witnesses, seven in number, being residents of Col-  
linsville and passengers on car, with one exception, the motor-  
man. The physical conditions and undisputed facts in accord  
with this testimony it would be against all precedent to hold  
that the verdict of jury finding deceased was in exercise of  
due care should not be set aside.

There is no evidence that the car was being run at a high  
rate of speed. The undisputed evidence is it stopped in from  
eight to fifteen feet after accident. There is the evidence of  
several witnesses that gong was sounded repeatedly back about  
two blocks and up to the place where the accident occurred.

Without giving in detail the evidence of the several wit-  
nesses the case as made would not sustain a verdict on either  
the due care of deceased or the negligence of the Company, be-  
cause the judgment and verdict is against the manifest weight  
of the evidence the judgment will be reversed and case re-  
manded.

REVERSED AND REMANDED.

#####  
(Not to be reported in full.)

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 that pretend to give any account of deceased at the time and  
 just before the accident. Elizabeth Grater and Mrs. Thibodeau and  
 all say he was driving west near center of street and neither  
 say they saw him do anything to avoid injury. Other witnesses  
 say, who were disinterested, that deceased was driving west a  
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 eight to fifteen feet after accident. There is the evidence of  
 several witnesses that gang was wounded repeatedly back about  
 two blocks and up to the place where the accident occurred.  
 Without giving in detail the evidence of the several wit-  
 nesses the case as made would not sustain a verdict on either  
 the due care of deceased or the negligence of the "motor", be-  
 cause the judgment and verdict is against the plaintiff and  
 of the evidence the judgment will be reversed and costs re-  
 manded.

REVERSED AND REMANDED.

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(Not to be reported in full.)

*I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.*

*IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28<sup>th</sup> day of July, A. D. 1911*

*Clerk of the Appellate Court*

# OPINION

8



137 253

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff

And afterwards in Vacation, after said March term, to-wit: On the 28th day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Haller & Livingston

~~ERROR TO~~  
APPEAL FROM

188 I.A. 352

vs.

No.

45

Circuit

COURT

March Term, 1914.

Madison COUNTY

American Car &  
Foundry Co.

TRIAL JUDGE

Hon.

Geo. D. Harris



Term No. 46.

March Term 1913.

Heller & Livingston,

Appellants,

vs.

American Car & Foundry  
Company,

Appellee.

Special Order of the  
Court.

1881A-259

Opinion by Harris, J.

This suit was commenced before the court by the appellants to recover an assignment of wages given by one Floyd Aiken for wages earned while in the employ of appellee. The case was brought to the circuit court for a trial in that court by jury at the close of which by appellant on appellee's motion the court rendered a verdict finding for appellee. After the verdict an order for new trial being either entered or filed, the court entered judgment on the verdict, and appellant thereupon filed an appeal, which brings the case to this court for review.

Floyd Aiken on the 27th day of November, 1911, was assigned of all wages and salary compensation for the next six months due and to become due and payable to him by the American Car & Foundry Company, his employer. Aiken was in the employ of the American Car & Foundry Company from January 1910-1913 but there is no record of his employment at the time or previous to the assignment. Appellant was at the time of the assignment a corporation organized under the laws of the State of Maryland.



property and assets of the partnership. That appellee never received notice of the assignment and was paid the wages earned by him.

A party taking and accepting assignments of the law is relied upon to bind a third party, not a party to the assignment. Under the law assume some responsibility which is not assumed by saying we have done enough to put the third party upon notice. A party bringing suit must prove all the necessary elements to entitle it to recover and in the manner the rules of law require.

From an examination of the record in this case there are several reasons any one of which would be sufficient to sustain the judgment of the trial court, but appellant is satisfied to rely in the presentation of this appeal upon one of the grounds of its assignment of errors. That judgment of trial court should be reversed because the judgment was based on a finding by the court that no sufficient notice of the assignment had been, by lawful means, served upon appellee.

The argument of appellant is based upon this alleged error and as we cannot agree with appellants upon this proposition and do agree with the trial court in directing a verdict, we need serve no good purpose to discuss the facts or law involved further than to dispose of the question raised by appellant. The sufficiency of the notice of assignment, the relation of the parties, their interest in the subject matter of the suit and that the law requires actual notice of the assignment shall be proven.

If the copy of the notice offered in evidence is otherwise competent as a copy, there is no evidence nor offer to prove that the original was enclosed in an envelope, addressed in a place for receiving United States mail with postage directed to appellant. That no notice was served

property and control of the partnership. The partnership never received notice of the assignment or the fact that the wages earned by him.

A party taking and accepting assignment of the partnership is not bound to give a thing to the partnership under the law assume some responsibility which is not a thing by saying we have done enough to put the thing in the hands of a party bringing suit must prove all the necessary elements entitle it to recover and in the manner the right of recovery.

From an examination of the record in this case it appears several reasons any one of which would be sufficient to justify the judgment of the trial court, but sufficient to justify to rely in the presentation of this appeal for one of the reasons of its assignment of errors. The judgment of the trial court should be reversed because the judgment was based on a finding by the court that no sufficient notice of the assignment been, by lawful means, served upon applicant.

The argument of applicant is based upon this finding and as we cannot agree with applicant upon this finding and do agree with the trial court in directing a verdict for the respondent no good purpose to discuss the facts or law of the case further than to dispose of the question raised by applicant. The sufficiency of the notice of assignment, the relation of the parties, their interests in the subject matter of the assignment and that the law requires actual notice of the assignment shall be proven.

If the copy of the notice offered in evidence is competent as a copy, there is no evidence to prove that the original was enclosed in an envelope, and in a place for receiving United States mail, and that the postage directed to applicant. That applicant is entitled to

receipt of itself does not prove anything as to the notice received by appellee at that time from appellant and is to be considered as a link in the chain of evidence necessary to show that appellee had actual notice of the claim of appellant. There being no proper foundation laid for the introduction of the copy of the notice it was properly excluded. There does not appear to be any evidence of notice to appellee of appellant's assignment upon which this suit could be maintained without it appellant could not recover. The judgment is therefore be affirmed.

affirmed.

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(Not to be reported in full.)

received. It is difficult to say whether the  
received is applied to the fact that the  
to be considered as a fact in the case with  
to show that the evidence had been received  
appellant. There being no proper foundation  
of the copy of the letter to the appellant, and  
there does not appear to be any evidence of notice  
of appellant's assignment upon which it can be  
without it appellant could not recover. It is  
therefore be affirmed.

Reversed.

(Not to be reported in full.)



I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court  
at Mt. Vernon, this 24<sup>th</sup> day of July,

A. D. 1914.

A. C. Millspaugh

Clerk of the Appellate Court

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# OPINION

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*Fee \$*

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137 1254

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff

And afterwards in Vacation, after said March term, to-wit: On the \_\_\_\_\_ day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

~~BRON TO~~  
APPEAL FROM

Weinstein  
188 I.A. 353

No. 46 vs.

March Term, 1914.

City

COURT

E. St. Louis

~~COUNTY~~

Garcinski

TRIAL JUDGE

Hon. R. A. Domingue



Term No. 46.

1901 Term No. 46. 1901.

L. Weinstein,

Appellant,

vs.

Appeal from St. Louis, Mo.

Pete Garcinski,

Defendant.

Appellee.

Opinion by Harris, J.

1881 A 353

This is a suit commenced by appellant against appellee before a Justice of the Peace in East St. Louis for the sum of \$100.00 which appellant claimed to be due him from appellee. The Justice of the Peace sustained the claim of attachment and rendered judgment in favor of appellant against appellee for the amount claimed and costs. Appellee perfected an appeal to the City Court of East St. Louis, and upon trial before a jury, the jury returned a verdict in favor of appellee, and motion for new trial being overruled, the court entered judgment on verdict and against appellant. Appellant, which judgment <sup>appellant</sup> prosecutes his appeal to this court.

The facts in this case are not numerous, but they leave the truth somewhat uncertain.

Appellant came, in September, 1901, from his home in West business in East St. Louis and appellee, who was a short distance from the place of business of appellant, had a number of checks in his possession which he gave to divers persons given by the steel foundry, and he took them to the place of business of appellant and told appellant that he was in need of more funds to cash checks. Appellant cashed checks which appellant says amounted to 454.45, and



says amounted to \$554.37, and gave appellee the sum of \$300.00 in cash leaving the checks with appellee. Appellant obtained the money.

The following Monday morning appellant received a check from the lady and upon the wife of appellee calling on appellant for balance due appellee, he appellant informed her he had not obtained the cash on the checks and at her request, he, appellant turned over to her \$245.12 in checks and 7.22 in cash. Appellant says with the understanding she was to return and give him in cash the sum of \$100.00. The wife of appellee denied this part of the conversation. Appellant insists that this judgment should be reversed:

First: Because the verdict is against the preponderance of the evidence.

Second: The court erred in admitting improper evidence.

Third: The Court gave improper instruction for appellee.

The first objection one frequently urged as a ground for reversal must be considered from the facts appearing in each particular case. This case the attachment feature has been abandoned by appellant upon the trial in the first court as no evidence appears in record, as with that branch of the case out of the way it is only necessary to consider, did appellee owe appellant the \$100.00, or was the evidence on this question such as to sustain a verdict of the jury that he did not.

Appellant, his son, and a witness by the name of Jacob give in their own way evidence that tends to establish the claim of appellant and they are corroborated by the lady, Zeiser, from who, appellant says he borrowed the \$300.00 on Saturday night. The appellee says he turned over to appellant one hundred dollars more in checks than claimed by appellant.

[illegible]

Second: The court says in Exhibit "c" page 6  
Third: The court says on page 7 that it is  
The first object of the trial was to  
reveal what a competent jury would find.  
Particular case. This is the ordinary law  
have been abandoned by all object upon the trial  
as no evidence appears to support the fact  
out of the fact that the jury found  
appeals as against the \$100,000, and the  
question such as to whether or not the jury

did not.

one hundred dollars more in specie than it had on Saturday night. The applicant says he knows every dollar he has, from who, applicant says he knows the exact date of payment and they are corroborated by the bank. Give in their own way, without any other to make the applicant, his son, and a witness of his own.



and in this he is corroborated by the testimony of Schmidt. It is not alone the number of the items that may consider in arriving at their verdict.

Where there is a controversy of this kind, the only way of arriving at the truth from the little things that are in dispute take place between the parties shown by the evidence. It can be done from determining from the facts and circumstances as alone there are set of witnesses take the affirmative and the other the negative of the issues. In this case the truth. The undisputed circumstances in this case are sufficient to sustain the verdict. The only objection was complained of by appellant in the argument in which he appeals wherein he was asked: do you owe Einstein a penny now? And the answer was: I don't owe one penny.

The objection is that it was the issue in this case that the answer called for a conclusion of the witness as to the issue. While this is true it is proper for a witness to deny and negative in as broad terms as possible the change. The appellant here said he called Einstein a penny. It was proper for defendant to deny that change. The question and answer were proper in substance and the fact that it done appellant no harm.

~~The~~ <sup>Two</sup> instructions were given for appellant and for the issue of attachment and issue of amount involved and for the issue for appellee, six of which are objected to on the ground that a general objection was made in favor of them. Instructions 6, 7, 8, 9, and 10 are misleading and improper.

These instructions when examined with the facts of the case are neither misleading or improper, except for instructions four. This instruction calls upon the jury to determine the material issues in the case are, are shown in the evidence, ion, \_\_\_\_\_



and in some of the authorities have been held to be a reversible error, but in other cases similar errors have been held to be of no consequence. The opinion of the court affected the verdict.

We are of the opinion that the error in the instructions did not obscure the issues. The issue of a single sentence, the appellant having abandoned the attachment issue the only question before the jury to determine was, did the appellee owe the appellant money, or did he not owe him. The jury were instructed by other instructions on the issues involved. The rule as to reversal for the giving of improper instructions will be followed. As it is apparent substantial justice has been done the judgment should not be reversed for slight errors in the instructions. (Dowd vs. Drainage Dist. 2, 160 App., 4761).

The question in this case was one of fact and it is a well established rule that this court will not set aside a verdict on the ground the jury have reached a wrong conclusion on the facts or a different conclusion than that entertained by the court unless the record shows that the verdict is against the weight and preponderance of the evidence, this court is not to interfere. (vs. Bahrns 156 Ill., 314. Zeller vs. Zeller 210 Ill., 411).

We find no error in the record and the judgment will be affirmed.

Affirmed.

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(Not to be reported in full).

[illegible]

The question in this case was one of fact and not of law. The established rule that this court will not set aside a verdict on the ground the jury have reached a wrong conclusion is a rule of fact or a different conclusion than that entertained by the jury. Unless the record shows that the verdict is against the weight of the evidence, this court is not to interfere. *See* *W. B. Barnes v. B. B. Barnes*, 125 Ill. 434. *See also* *W. B. Barnes v. B. B. Barnes*, 125 Ill. 434. We find no error in this record and the case and the judgment will be affirmed.

(Not to be reported in full)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court  
at Mt. Vernon, this 27<sup>th</sup> day of July

A. D. 1911

A. C. Millspaugh

Clerk of the Appellate Court

# OPINION

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1301/255

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSAUGH, Clerk.

W. S. PAYNE, Sheriff

And afterwards in Vacation, after said March term, to-wit: On the 25th day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Kennedy

ERROR TO  
APPEAL FROM

188 I.A. 355

Circuit COURT

vs.

No. 48

March Term, 1911.

Williamson COUNTY

Chicago & Castorville  
Coal Co.

TRIAL JUDGE

Hon.

W. M. Butler





Term No. 48.

1914 No. 20.

March Term, A. D. 1914.

James C. Kennedy, Administrator  
of the Estate of John S. Kennedy,  
deceased,

vs.

Appellee,

Chicago & Carterville Coal Com-  
pany,

Appellant.)

Appeal from the  
Circuit Court of  
Williamson County.

1897 A. 355

Opinion by Harris, J.

This is an action in case brought by appellee to recover damages for the death of appellee's intestate in the sum of ten thousand dollars. Said death occurred on the 7th day of May, 1911, by slate and rock falling on deceased from the roof of the 7th north entry off of the fourth east entry in mine of appellant.

The original declaration consisted of seven counts, and by direction of the court, the jury having found defendant not guilty under all the counts except the fourth, fifth and sixth, we find it unnecessary to give any of the other counts consideration.

The fourth count alleges that the defendant was operating a mine on May 7th, 1911, in which a large number of men including the deceased were employed; that on said date John S. Kennedy was in the employ of the defendant as a track layer; that there was a squeeze or low place in the roof of the 7th north entry off the 4th east entry in the mine which prevented the free passage of the electric motor car; that on said date the deceased was ordered by the defendant's foreman to leave his work as track layer and go under said roof in the 7th north entry with a pick and other tools to take down the coal, slate and

March Term, A. D. 1914.

Appeal from the  
Circuit Court  
of the State of Illinois  
in and for the County of Cook.  
*William*

1897 A. 355

James C. Kennedy, Administrator  
of the Estate of John E. Kennedy,  
deceased,  
Appellee,  
vs.  
Chicago & Carterville Coal Com-  
pany,  
Appellant.

Opinion by Harris, J.

This is an action in case brought by appellee for damages for the death of appellee's intestate in the sum of ten thousand dollars. Said death occurred on the 7th day of May, 1911, by slate and rock falling on deceased from the roof of the 7th north entry off of the fourth east entry in mine of appellant.

The original declaration consisted of seven counts, under direction of the court, the jury having found defendant guilty under all the counts except the fourth, fifth and sixth, we find it unnecessary to give any of the other counts and the station.

The fourth count alleges that the defendant was operating a mine on May 7th, 1911, in which a large number of men including the deceased were employed; that on said date the defendant was in the employ of the defendant as a track layer; that there was a adze or low place in the roof of the 7th north entry off the 4th east entry in the mine which prevented the passage of the electric motor car; that on said date the defendant was ordered by the defendant's foreman to leave his position on track layer and go under said roof in the 7th north entry with a pick and other tools to take down the roof.

rock in the roof of said entry at said low place; that the roof was in a dangerous condition and was disturbed with picks or other tools in the manner of the work as herein stated; that defendant knew of such dangerous condition of the roof and of the dangerous danger of doing the same or by the exercise of reasonable care could have known thereof; that while deceased was in the exercise of reasonable care for his own safety and when he did not know of the aforesaid, nor of the dangerous method of doing the work, while he was attempting to take down the roof he ordered the foreman said rock, slate and other material suddenly became detached and fell upon him.

The fifth count which alleges the same ownership and operation of the mine and the same employment therein of the deceased; that there was a low roof in the 7th north entry which defendant desired to take down in order to make more room between the track and the roof; that defendant's foreman in carrying out the work negligently and carelessly ordered the deceased to take down said roof in a dangerous manner, that is to say, to order the same and with pick and wedge and sledge take the roof down; that the method of taking said roof down was known to defendant to be dangerous or by the exercise of reasonable care could have been known to be dangerous; that the dangerous method of taking said roof down was not known to the deceased, that he did not have equal means of knowing of said danger with defendant; that in consequence of the dangerous method of taking said roof down it fell upon the deceased killing him, while he was in the exercise of due care for his safety.

The sixth count alleges the same ownership and operation of the mine and that there was a low place in the roof of the 7th north entry <sup>which</sup> defendant desired to take down in order

rock in the roof of said entry at said low place; that said roof was in a dangerous condition and was likely to fall and be disturbed with picks or other tools in the manner of said work as herein stated; that defendant knew of such dangerous condition of the roof and of the dangerous manner of removal the same or by the exercise of reasonable care could have known thereof; that while deceased was in the exercise of reasonable care for his own safety and when he did not know of the dangerous condition, nor of the dangerous method of doing the work, while he was attempting to take down the roof as ordered by foreman said rock, slate and other material suddenly fell and he was struck and fell upon him.

The fifth count alleges the same ownership and operation of the mine and the same employment therein of the deceased; that there was a low roof in the 4th north entry which defendant desired to take down in order to make more room between the track and the roof; that defendant's foreman in charge of the work negligently and carelessly ordered the deceased to take down said roof in a dangerous manner, that is to say, to go under the same and with pick and wedge and sledge take the same down; that the method of taking said roof down was known by the defendant to be dangerous or by the exercise of reasonable care could have been known to be dangerous; that the dangerous method of taking said roof down was not known to the deceased, and he did not have equal means of knowing of said danger with defendant; that in consequence of the dangerous method of taking said roof down it fell upon the deceased killing him, while in the exercise of due care for his safety.

The sixth count alleges the same ownership and operation of the mine and that there was a low place in the roof of the 4th north entry which defendant desired to take down in order to make

more room for its electric motor car to pass; that the foreman in charge of said work negligently and carelessly considered the deceased to take the coal, slate and rock coming from the roof in said entry in a dangerous manner, that is to say, to go under said roof and begin with picks at the edges or margins of said sag or low place and take said roof down by facing each other until the said workmen should meet in the center or middle of said low place; that the method of taking said roof down as aforesaid was known by defendant to be dangerous or by the exercise of reasonable care could have been known to be dangerous; that the deceased did not know that the method employed by the defendant was dangerous nor did he have any means with the defendant of knowing thereof; that while the deceased was taking said roof down in the exercise of due care for his own safety, it fell upon him killing him instantly.

To this declaration the defendant filed the general issue. The jury returned a verdict in favor of the plaintiff assessing his damages at Three Thousand Dollars. A motion for new trial was made and overruled and judgment was entered on the verdict.

This case has been tried twice and submitted to two juries. Upon the three counts mentioned, the jury upon each trial returning a verdict in favor of appellee for the same amount.

This being the second appeal to appellate court we adopt the former opinion of this court appearing in Volume 180 of the Reports, 42, and the statement of fact in that opinion is here adopted as follows: "On May 7, 1911, John Kennedy was killed in the defendant's mine by the falling of coal and slate from the roof of an entry which he was engaged at the time in taking down. The place was a low place in the roadway in the seventh north entry off the fourth east entry in defendant's mine, which place was not

more room for the electric motor car to pass under; that the foreman in charge of said work negligently and carelessly ordered the deceased to take the coal, slate and rock down from the roof in said entry in a dangerous manner, that in so doing to go under said roof and begin with picks at the edge or edge of said roof or low place and take said rock down and come facing each other until the said workmen should meet in the center or middle of said low place; that the method of taking said roof down as aforesaid was known by defendant to be dangerous or by the exercise of reasonable care could have been known to be dangerous; that the deceased did not know that the method employed by the defendant was dangerous nor did he have any means with the defendant of knowing thereof; that while deceased was taking said roof down in the exercise of due care for his own safety, it fell upon him killing him instantly.

To this declaration the defendant filed the general issue. The jury returned a verdict in favor of the plaintiff assessing his damages at Three Thousand Dollars. A motion for new trial was made and overruled and judgment was entered on the verdict. This case has been tried twice and submitted to two juries upon the three counts mentioned, the jury upon each trial returning a verdict in favor of appellee for the same amount \$3000. This being the second appeal to appellate court by appellant the former opinion of this court appearing in Volume 180 Ill. App. 42, and the statement of fact in that opinion is here adopted as follows: "On May 7, 1911, John Kennedy was killed in the defendant's mine by the falling of coal and slate from the roof of the entry which he was engaged at the time in taking down. There was a low place in the roadway in the seventh north entry off the fourth east entry in defendant's mine, which place was wet and

muddy and interfered to some extent with the operation of the motor used in hauling coal. On Saturday, May 6th, John Kennedy had been at work in this entry at this low place and on May 7th, the mine manager, passed through there Kennedy said to him, "I can't get this road in shape like it ought to be; this road ought to be cleaned up and this road filled up with ashes." And Flynn said to him, "Will you want to work tomorrow on it," and Kennedy said, "Yes;" and Flynn then said, "How many men do you want," and Kennedy said, "A couple besides myself," and Flynn said, "All right," and he then had the ashes taken in there and sent Morris and Proudlock with Kennedy. On the next day they began the work and Corcoran, the assistant mine manager, also came to assist them in this work. After raising the track it became necessary to take down a part of the roof so as to allow the motor to pass through without dragging off the coal and a Mr. Long was called in to assist in this work. There was about ten or twelve inches of coal which extended to a feather edge on the face of the slate roof. When they were ready to remove the coal Corcoran, the assistant mine manager, as stated by one of plaintiff's witnesses, examined the roof and found a soft or soft place in the roof and at that time said it did not look like it was going to get good but afterwards he took down this soft place and then said it was all right to go ahead and when this soft place was taken down the witness says the roof was solid and he went to cutting on one side of the entry and Corcoran on the other. He says Corcoran showed them how to do the work by cutting the pole on the side and wedging it down; that from time to time during the progress of the work they sounded the roof and pronounced it solid. The mine manager had no part off the part of this roof that was to be taken down, which

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muddy and interfered to some extent with the operation of the motor used in hauling coal. On Saturday, May 20, John Kennedy had been at work in this entry at this low place and the mine manager, passed through there Kennedy said to him, "can't get this road in shape like it ought to be; this road ought to be cleaned up and this road filled up with shales." Kennedy said to him, "Will you want to work tomorrow on it," and Kennedy said, "Yes;" and Flynn then said, "How many men do you want," and Kennedy said, "A couple besides myself," and Flynn said, "All right," and he then had the shales taken in there and sent Morris and Proudblock with Kennedy. On the next day they began the work and Corcoran, the assistant mine manager, also came to assist them in this work. After raising the track it became necessary to take down a part of the roof so as to allow the motor to pass through without dragging off the coal and Mr. Long was called in to assist in this work. There was about ten or twelve inches of coal which extended to a leather edge on the face of the slate roof. When they were ready to remove the coal Corcoran, the assistant mine manager, as stated by one of plaintiff's witnesses, examined the roof and found a potted or soft place in the roof and at that time said it did not look like it was going to get good but afterwards he took down this soft place and then said it was all right to go ahead and extract this soft place was taken down the witness says the roof became solid and he went to cutting on one side of the entry and Corcoran on the other. He says Corcoran showed them how to do the work by cutting the pole on the side and wedging it down; that from time to time during the progress of the work they sounded the roof and pronounced it solid. The mine manager had mounted off the part of this roof that was to be taken down, which



about thirty feet. Two of the men worked from the east end and two from the west end, working towards each other. About half an hour before the accident Corcoran left the place and the others remained at the work and about five minutes before the accident there was a pop in the roof and the men jumped back. Kennedy then sounded the roof and said it was solid and he proceeded with the work, as before, and had completed the circle of it except about four feet when the fall occurred. There were several tons of the coal and slate fell and caught Kennedy and crushed him to death. Kennedy had been at work for the defendant for about two years and, as appears from the evidence, was a miner of many years' experience; had been a mine foreman in some mine in Oklahoma for about five years, and that he had dug coal in Ohio and Alabama, had acted in the capacity of assistant mine manager for the defendant for four or five years, had papers in this state as a mine examiner and was a practical coal miner and competent to perform the duties of assistant mine manager, and to take down top coal and timber entry ways. That during this time he had worked for defendant his general business was a trader but during this time he also acted as assistant mine manager for four or five weeks; that he had been engaged in a place up place where there was gas to contend with, to create a place for an over cast and had been called upon to do and perform any kind of work in the mine, was regarded by the mine manager as competent to perform any kind of dangerous work and had from time to time performed for the defendant work of this character.

There are numerous errors assigned why this case should be reversed. It would serve no good purpose to extend this opinion into a discussion of more than the one: "That the verdict and judgment is against the manifest weight of the evidence."

about thirty feet. Two of the men worked from the east end and two from the west end, working towards each other. About half an hour before the accident occurred the men left the place and the others remained at the work and about five minutes before the accident there was a pop in the roof and the men jumped back and Kennedy then sounded the roof and said it was solid and safe. Kennedy then proceeded with the work, as before, and had completed the whole of it except about four feet when the fall occurred. There was several tons of the coal and slate fell and caught Kennedy and crushed him to death. Kennedy had been at work for the defendant for about two years and, as appears from the evidence, was a miner of many years' experience; had been a mine foreman in some mine in Oklahoma for about five years, and that he had dug coal in Ohio and Alabama, had acted in the capacity of assistant mine manager for the defendant for four or five years, had papers in this state as a mine examiner and was a practical coal miner and competent to perform the duties of assistant mine manager, and to take down top coal and timber entry ways. That during the time he had worked for defendant his general business was track layer but during this time he also acted as assistant mine manager for four or five weeks; that he had been engaged in opening up place where there was gas to contend with, to create a place for an over cast and had been called upon to do and perform any kind of work in the mine, was regarded by the mine manager as competent to perform any kind of dangerous work and had from time to time performed for the defendant work of this character. There are numerous errors assigned why this case should be reversed. It would serve no good purpose to extend this opinion into a discussion of more than the one: "That the verdict and judgment is against the manifest weight of the evidence."

That the evidence as it appears from the record is the same as presented to this court on the former appeal, except appellee produced two additional witnesses Thomas Clayton and David Love. The evidence of these two witnesses does not add anything to the issues in this case and as some of the contentions of appellant were the same on the former appeal we adopt the following language of the former opinion:

"It is contended by Counsel for appellant that before there can be a recovery in a case of this kind the burden is upon the plaintiff to prove by a preponderance of the evidence that the place, appliances method or thing charged as being defective, is defective, as alleged; that the defendant knew thereof or could have known thereof by the exercise of reasonable care; that the deceased did not know thereof and did not have equal means with the defendant of knowing thereof, and the deceased himself was, with reference to the injury, exercising reasonable care for his own safety. It is true as contended by counsel for appellee that, it is the duty of the master to use reasonable care to provide servants with a reasonable safe place in which to work is a positive obligation, and he is liable for the negligent performance of such duties whether he undertake its performance personally or through another. (Himrod v. Clark, 197 Ill., 514.) It is charged by this declaration that the deceased was placed in a dangerous place to work which was known to the defendant or by the exercise of reasonable care could have been known to it, and that deceased did not know of its dangers and did not have equal means with the defendant of knowing it. It is true, as appears from the evidence, that in the prosecution of the work, a clod fell and killed John Smith, but what was the apparent condition prior to the fall and burial

That the evidence as it appears from the record is that the evidence presented to this court on the former appeal, excepting the evidence of these two witnesses does not add anything to the issues in this case and as some of the contentions of the defendant were the same on the former appeal we adopt the language of the former opinion:

"It is contended by Counsel for appellant that before there can be a recovery in a case of this kind the burden is upon the plaintiff to prove by a preponderance of the evidence that the place, appliances method or thing charged as being defective, is defective, as alleged; that the defendant knew or ought to have known thereof by the exercise of reasonable care; that the deceased did not know thereof and did not have equal means with the defendant of knowing thereof, and the deceased himself was, with reference to the injury, exercising reasonable care for his own safety. It is true as contended by counsel for appellee that it is the duty of the master to see that reasonable care to provide servants with a reasonable safe place in which to work is a positive obligation, and as is liable for the negligent performance of such duties whether he is negligent in its performance personally or through another. (Hinson v. Clark, 197 Ill. 514.) It is charged by this declaration that the deceased was placed in a dangerous place to work which was known to the defendant or by the exercise of reasonable care could have been known to it, and that deceased did not know of its dangers and did not have equal means with the defendant of knowing it. It is true, as appears from the evidence, that in the prosecution of the work, a cliff fell and killed John Kennedy, but what was the apparent condition prior to the fall and during

the time the men were engaged at work in taking down this coal. The evidence is overwhelming that prior to the accident the men there engaged at work did from time to time sound the roof and that it appeared to be solid. The only time that any fall in the roof was shown to exist was prior to the commencement of the work, when Corcoran, the assistant mine manager, sounded the roof and found a soft place which he removed and after this soft place was removed the same witness then says the roof became solid and continued so up to the time of the fall, and some of the witnesses say that the fall was occasioned by a fault in the slate which could not be seen by any one.

It is contended that there was a squeeze on in the mine, near this entry, which made it dangerous. We have examined this record carefully and practically all of the witnesses say that the squeeze did not extend to this place; that a squeeze is evidenced by the bulging up of the bottom, or the pressure upon the pillars, causing them to chip off and that no such evidences were present; and they further say that some of the coal remained upon this roof. One witness testified that he thought the squeeze extended to this entry but on cross examination he did not know <sup>whether</sup> there was much of an upheaval of the bottom or crushing of the pillars or not, he did not examine it. The other witnesses did examine it and say that no such thing occurred. Practically all of the witnesses for appellee and appellant who had any knowledge upon this subject say that from the time of the removal of the soft spot above referred to by Corcoran, that the roof continued solid. It seems to follow from this evidence that any reasonable person would have been justified in concluding that the place in which the men were engaged at work, and their manner of performing it was reasonable and safe.

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We believe that it appears from this evidence that the defendant's representatives and the deceased both believed the place at which they were engaged at work to be reasonably safe, and that it is not made to appear that there was any reason why the representatives of the defendant could have believed otherwise. They, as well as others that worked with them and the deceased, applied the usual test for determining its safety, and we think sincerely came to the conclusion that it was safe to work under. We think that John Kennedy was a man of experience and that he had as much opportunity to know the conditions as the managers. It in fact appears from the record that about thirty minutes before the fall came the defendant's manager had gone to some other part of the mine and that in the meantime there was a pop in the roof which caused the men to jump back, and then John Kennedy tested the roof and proceeded with the work. It certainly looks as if his opportunities were as good as any man's to know the real conditions of that roof; and if this be true then under the doctrine laid down by our supreme court it is only-necessary to prove that the place was defective, <sup>but</sup> ~~by~~ the plaintiff must also prove that he did not know of the defect and had not equal means of knowing with the master. (Montgomery Coal Co. v. Harringer, 218 Ill., 327; Goldie v. Turner, 181 Ill., 551.) One of the witnesses who helped to remove the fall after the injury says the slate was hard, that they had to take a sledge to break it up and this confirms the statement of other witnesses that it appeared solid in the roof, and that the fall probably came from the fault in the slate which was concealed from every one.

It is contended, however, by counsel for appellee,

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It is contended, however, by counsel for appellee, that the



deceased was taken from his usual work and was at this time engaged at work under a specific order given by the defendant. Each count of the declaration alleges that the deceased was taken from his usual work; charges that the defendant knew of such dangerous condition or could have known thereof by the exercise of reasonable care, and that the plaintiff's intent to did not know the dangers and did not have equal means with the defendant of knowing thereof, which, as we understand the law, it was necessary for the plaintiff to allege to entitle him to recover. *Wiggins Ferry Co. v. Hill*, 112 Ill., App. 475. As we have before observed, the appellee has failed to prove some of the material averments above set forth but aside from this we do not believe that the principle invoked by him is applicable to the facts in this case. The deceased was shown by the evidence to be a capable man, one of many years experience in mining, having had several years' experience as mine foreman, was experienced in taking down and removing coal and slate from the roof of a mine, had been engaged in track laying and had, in fact, in this mine, pursued to some extent each one of these particular occupations and was relied upon and used as a sign for that purpose on account of his skill to care for and repair dangerous places in a mine. The mere fact that he had, on the day previous, been engaged in the particular business of track laying and was taken from that work and placed at a work that, as understood, had heretofore performed and was experienced in, would not bring him within the rule of having been transferred from his regular business to a work to which he had no acquaintance. It is the fact of the servant being placed at a work with which he had no acquaintance, concerning which he was not informed, that the burden is cast upon the master.

deceased was taken from his usual work and was engaged at work under a specific order given by the defendant. Each count of the declaration alleges that the deceased was taken from his usual work; charges that the defendant had such a negligent condition or could have known thereof; and that the plaintiff's injury was due to the defendant's negligence, which, as we understand it, it was necessary for the plaintiff to allege to entitle him to recover. *Wiggins Ferry Co. v. Hill*, 112 Ill. App. 475. We have before observed, the appellee has failed to prove any of the material averments above set forth but since the evidence we do not believe that the principle invoked by him is applicable to the facts in this case. The deceased was shown by the evidence to be a capable man, one of many years experience in mining, having had several years' experience as mine foreman, experienced in taking down and removing coal and stone from the roof of a mine, had been engaged in track laying and in fact, in this mine, pursued to some extent each one of these particular occupations and was relied upon and used for that purpose on account of his skill to care for and repair various pieces in a mine. The mere fact that he had been previously engaged in the particular business of track laying and was taken from that work and placed at a work that he understood, had heretofore performed and was experienced in, would not bring him within the rule of having been transferred from his regular business to a work to which he had no acquaintance. It is the fact of the servant being placed at a work with which he had no acquaintance, concerning which we are not informed, that the burden is cast upon the master to show that

he is not exposed to dangers unknown to him. The things the facts are that the deceased was as well acquainted with the work in which he was engaged as the assistant mine manager or any other person employed in this work at that time. It was necessary for the plaintiff to allege and prove that the order was negligently given and to make it a negligent order it was necessary to prove that the place to which the servant was sent to perform the work or the manner of its performance was not reasonably safe and that the Master knew it or could have known it. It is said in the case of *Swiercz vs. Illinois Steel Co.*, 231 Ill., 466: 'The issue on trial was the negligence of the defendant. It was essential to the plaintiff's case that the order should have been negligently given. It was necessary to prove that the defendant knew, or by the exercise of reasonable care might have known, of the danger.'

The evidence in this case having been twice examined by this court we again reach the conclusion that the verdict of the jury is against the manifest weight of the evidence. That the deceased's knowledge of conditions and the dangers was equal to, if not superior to that of appellant, if so his representative could not recover. That the place at the time of the accident was reasonably safe, if so he could not recover. That the order <sup>was</sup> given a general order and not a direct specific order to do work in a particular manner, and if a general order it did not relieve deceased of the assumption of risk. (*Muthen vs. Jeffrey*, 259 Ill., 378.) The deceased assumed the risk incurred by obedience to a negligent order of the master when the danger was to him as apparent open and understood as it is to the master who gives the order. (*Swiercz vs. Ill. Steel Co.*, 231 Ill., 466.)

he is not exposed to dangers unknown to him. It is well known that the deceased was as well acquainted with the work in which he was engaged as the assistant mine manager or any other person employed in this work at that time. It was necessary for the plaintiff to allege and prove that the order was negligently given and to make it a negligent order it was necessary to prove that the place to which the servant was sent to perform the work or the manner of its performance was not reasonably safe and that the Master knew it or could have known it. It is said in the case of *Switzer vs. Illinois Steel Co.*, 281 Ill. App. 1, 10. The issue on trial was the negligence of the defendant. It was essential to the plaintiff's case that the order should have been negligently given. It was necessary to prove that the defendant knew, or by the exercise of reasonable care might have known, of the danger."

The evidence in this case having been twice examined by this court we again reach the conclusion that the verdict of the jury is against the manifest weight of the evidence. That the deceased's knowledge of conditions and the dangers was equal to that of the plaintiff, if so his representative could not recover. That the place at the time of the accident was reasonably safe, if so he could not recover. That the order <sup>was</sup> given a general order and not a direct specific order to do work in a particular manner, and if a general order it did not relieve deceased of the assumption of risk. (*Hutten v. Liberty*, 259 Ill. 378.) The deceased assumed the risk incurred by obedience to a negligent order of the master when the danger was to him as apparent and understood as it is to the master who gives the order. (*Switzer vs. Ill. Steel Co.*, 281 Ill. 456.)

It is not pretended that there was any danger latent or apparent for either master or servant at or near this place, except the evidence that some years prior thereto there had been a squeeze all trace of which and danger therefrom had been removed long prior to time of accident. It is not claimed that deceased did not have the knowledge, experience and ability to know and did know all that a reasonably prudent man could have known of the safety of the place. This being the condition of this record it would certainly not be in accord with justice to permit a verdict and judgment entered upon this state of facts to stand; notwithstanding, the argument of appellee that because twenty-four men have passed upon the same state of facts and reached the same conclusion by setting their finding aside the jury system becomes a failure.

We will treat this as an appeal to give the verdict of juries and judgments of the trial courts the consideration and presumptions they are entitled to under the law, because counsel for appellee would not want any other construction put upon it.

The duty and responsibility now imposed upon this court is that notwithstanding there is evidence in the record tending to support the verdicts in favor of appellee, yet it is the duty of this court to review questions of fact and to reverse a judgment based upon the verdict of the jury when upon a consideration of the evidence, it finds such verdict clearly against the manifest weight of the evidence. This has been the law so long that it is undisputed. (I.C.R.R.Co. vs. Hecker, 129 Ind. 374; Harvey vs. McGuirk, 168 App., 390.)

The facts in this case will never appear different, the trial would serve no good purpose, labor and expense to the parties and counsel with the same result. When these are the facts

It is not pretended that there was any danger fatal or otherwise to the parent for either master or servant at or near this place, except the evidence that some years prior thereto there had been a dangerous all trace of which and danger therefrom had been removed long prior to time of accident. It is not claimed that deceased did not have the knowledge, experience and ability to know and did know all that a reasonably prudent man could know of the safety of the place. This being the condition of this record it would certainly not be in accord with justice to permit a verdict and judgment entered upon this state of facts to stand; notwithstanding, the argument of appellee that because twenty-four men have passed upon the same state of facts and reached the same conclusion by setting their finding aside the jury system becomes a failure.

We will treat this as an appeal to give the verdict of juries and judgments of the trial courts the consideration and presumptions they are entitled to under the law, because counsel for appellee would not want any other construction put upon it.

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of this court to review questions of fact and to reverse a judgment based upon the verdict of the jury when upon a consideration of the evidence, it finds such verdict clearly against the manifest weight of the evidence. This has been the law long that it is undisputed. (1 G.R.R.Co. vs. Hecker, 190 App. 325. Harvey vs. McGuirk, 168 App., 360.)

The facts in this case will never appear different, another trial would serve no good purpose, labor and expense to the parties and counsel with the same result. When there are the facts

and the condition of this record the duty of this court as was said in the case of the Illinois Steel C. vs. Kennell, 98 App. 83, "If the finding of the jury be without any support whatever, or if it be contrary to the manifest weight of the evidence, in either case the duty of this court is to so declare and to set aside a judgment based upon such a finding." (Citing many cases where the Supreme Court so held when it reviewed questions of facts.)

A second verdict based upon substantially the same evidence will be set aside as against the evidence and a final judgment rendered in favor of adverse party where the evidence does not support the judgment of the lower court. (Harver vs. McGuirk, 168 App., 39.)

The mere fact that a jury have passed upon questions of fact can not absolve this court from determining whether or not the verdict is justified by the evidence. (I.C.R.R.Co. vs. Cunningham, 102 App., 206.)

The judgment will therefore be reversed.

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Reversed.

Finding of fact to be incorporated in the record: find, First: That appellee's intestate was not at the time of the accident acting under a negligent order of appellant.

Second: That the conditions of safe or unsafe place to work at the place where accident happened were as well known to appellee's intestate as to appellant.

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(Not to be reported in full.)

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Reversed.

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 Second: That the conditions of safe or unsafe place to  
 work at the place where accident happened were as well known  
 to appellee's intestate as to appellant.

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(Not to be reported in full.)



I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 25<sup>th</sup> day of July,

A. D. 1911.

*A. C. Millspaugh*  
Clerk of the Appellate Court

# OPINION

*Fees*

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1312 1258

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff

And afterwards in Vacation, after said March term, to-wit: On the 22 day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Fritchett

adm.

ERROR TO  
APPEAL FROM

1981 A. 377

vs.

Circuit

COURT

No.

58

March Term, 1914.

Pulaski

COUNTY

LCRRCO

TRIAL JUDGE

Hon.

M. W. Butler



Term No. 58.

Appendix No. 11.

March Term, A. D. 1914.

Clay Brechett, Administrator of the  
Estate of Lewis W. Johnston, de-  
ceased,

Appellee,  
vs.

Illinois Central Railroad Company,

Appellant.)

Appeal from the  
Circuit Court of  
Alaska.

Opinion by Harris, J.

1881 A. 277

This is a suit brought by appellee against appellant for  
wrongfully causing the death of Lewis W. Johnston.

The declaration filed and upon which the trial was con-  
sisted of five counts, the formal parts of each count being ~~xxx~~-  
practically the same and alleging: That on the 25th day of  
January, 1913, in the life time of Lewis W. Johnston appellant  
was the owner, operating and using a certain railroad extending  
through county aforesaid and through the village of Illis, a  
densely populated portion of said county, and being such owner,  
appellant then and there drove a certain locomotive engine with  
train of cars thereto attached up to, upon and across a travel-  
led way in said village and appellee's intestate was traveling  
along and upon said travelled way from his place of business on  
the east side of said village to his place of residence on the  
west ~~side~~ <sup>side</sup>, exercising due care for his own safety, the said train  
by its servants run said train at a high and dangerous rate of  
speed, ~~x~~ 45 miles per hour through said village, no bell or  
whistle being sounded on said locomotive, and no red light  
burning although it was dark, and that appellee's intestate was  
struck and instantly killed. That Lewis W. Johnston left be-  
hind a widow, son, two daughters and a grand daughter.

March Term, A. D. 1914.

Appeal from  
Circuit Court  
of Illinois

Clay Brecheett, Administrator of the  
Estate of Lewis W. Johnston, de-  
ceased,  
Appellee,  
vs.  
Illinois Central Railroad Company,  
Appellant.

Opinion by Harris, J.

This is a suit brought by appellee against appellant  
wrongfully causing the death of Lewis W. Johnston.  
The declaration filed and upon which the trial was  
based stated of five counts, the formal parts of each count being  
practically the same and alleging: That on the 25th day of  
January, 1913, in the life time of Lewis W. Johnston appellee  
was the owner, operating and using a certain railroad extending  
through county aforesaid and through the village of Joliet,  
densely populated portion of said county, and being such owner,  
appellant then and there drove a certain locomotive engine  
train of cars thereto attached up to, upon and across a travel-  
led way in said village and appellee's interstate was so  
along and upon said travelled way from his place of business on  
the east side of said village to his place of residence on the  
west side, exercising due care for his own safety, and  
by its servants run said train at a high and dangerous  
speed 45 miles per hour through said village, no bell  
ring sounded on said locomotive, and no head-light  
though it was dark, and that appellee's interstate  
instantly killed. That Lewis W. Johnston left a  
widow, son, two daughters and a grand-daughter.

his heirs at law and next of kin, who are still living and have been deprived of their means of support and education and the damage of appellee as administrator of \$10,000.00. In the consideration of this case it will become necessary to refer to the different counts of this declaration, and they are distinguished as follows:

First count simply charges negligence in the handling of train run at excessive rate of speed, without bell or whistle being sounded and without a head light and it dark.

Second count and the count under which appellant was found guilty charges that the railroad of appellant crossed a certain traveled way in said village used by the public as a crossing for pedestrians at a point a short distance north of passenger station at Ullin and had been so used for 15 years, and as deceased was traveling as heretofore mentioned appellant by its servants as heretofore mentioned drove a certain train toward the traveled way and while deceased was rightfully traveling upon said traveled way appellant wilfully, wantonly and negligently drove and managed said train in that the locomotive was without a headlight although dark and was run at reckless and dangerous speed in Ullin, to-wit: 45 miles per hour, and no bell or whistle sounded and that by <sup>and</sup> through the carelessness, wantonness and wilful negligence Johnston was killed.

Third count charges the traveled way was used by the public by and with the consent, acquiescence and invitation of appellant in other respects similar to first count.

The fourth count charges a public highway to be at place where Johnston was killed and negligent operation as in first count.

The fifth count also charges a public highway and failure to

his heirs at law and next of kin, who are still living and have been deprived of their means of support and education the damage of appellee as administrator of \$10,000.00. In the consideration of this case it will become necessary to refer to the different counts of this declaration, and they are distinguished as follows:

First count simply charges negligence in the conduct of train run at excessive rate of speed, without bell or whistle being sounded and without a head light and its dark.

Second count and the count under which appellee was found guilty charges that the railroad of appellee crossed a certain traveled way in said village used by the public crossing for pedestrians at a point a short distance north of passenger station at Wilkin and had been so used for 15 years, and as deceased was traveling as heretofore mentioned as evidenced by its servants as heretofore mentioned drove a cart in front toward the traveled way and while deceased was rightfully traveling upon said traveled way appellee negligently drove and managed said train in that the locomotive was without a headlight although dark and was run at reckless and dangerous speed in Wilkin, to-wit: 45 miles per hour, and no bell or whistle sounded and that by through the carelessness, wantonness and willful negligence Johnston was killed.

Third count charges the traveled way was used by the public by and with the consent, acquiescence and invitation of appellee in other respects similar to first count.

The fourth count charges a public highway to be at place where Johnston was killed and negligent operation as in first count.

The fifth count also charges a public highway and it is the



give statutory signals. Appellant to this declaration filed the plea of not guilty and upon trial of the issues so joined by a jury a verdict was returned finding appellant guilty as charged in second count of the declaration and fixing appellee's damages at sum of \$8000.00. Motion for new trial overruled. Judgment entered and this appeal.

The facts in this case practically undisputed are that on the 25th day of January, 1913, appellant's railroad extended through the village of Ullin, a town of from 900 to 1000 population from the north to the south and about the center of the village north and south was appellant's depot on the east side of the tracks fronting west towards its tracks, the track next to depot known as north bound track, second track from depot south bound track, third track from depot passing track, and fourth track from depot house track. There is no street across right of way east and west nearer than 250 feet south of depot and another street 250 feet south of this one.

That immediately west of house track and extending south past the northwest corner of depot is a cattle pen; on the right of way of appellant immediately north of cattle pen and about 25 feet north of depot is a cinder walk from street running north and south; on west side of right of way and extending east on right of way to west side of passing track. The cinders to build this walk were furnished by appellant and constructed under direction of city authorities several years ago and used since by pedestrians. Immediately north of this cinder walk is a coal shed, the walk or traveled way as described in declaration is between the coal shed and cattle pen on right of way of appellant. There was no filling in between rails of pass-

five statutory damages. Appellant to this declaration the plea of not guilty and upon trial of the issues so joined by a jury a verdict was returned finding appellant guilty and charged in second count of the declaration and fixing monetary damages at sum of \$8000.00. Motion for new trial overruled. Judgment entered and this appeal.

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the 25th day of January, 1913, appellant's railroad extended through the village of Ullin, a town of from 300 to 1000 population from the north to the south and about the center of the village north and south was appellant's depot on the east side of the tracks fronting west towards its tracks, the track next to depot known as north bound track, second track from depot south bound track, third track from depot passing track, and fourth track from depot house track. There is no street across right of way east and west nearer than 250 feet south of depot and another street 250 feet south of this one.

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past the northwest corner of depot is a cattle pen; on the right of way of appellant immediately north of cattle pen and about 25 feet north of depot is a cinder walk from street running north and south; on west side of right of way and extending east on right of way to west side of passing track. The

cinders to build this walk were furnished by appellant and constructed under direction of city authorities several years ago and usedance by pedestrians. Immediately north of this cinder walk is a coal shed, the walk or traveled ways described in declaration is between the coal shed and cattle pen on right of way of appellant. There was no filling in between rails of road

ing track, switch or south bound track, between south bound and north bound tracks extending north from depot to a cinder path, appellant had constructed a board platform.

The passing track was used for storing cars and this cinder path was frequently blocked with such cars. It was at times opened up by appellant at request of authorities. There were cars standing upon it at the time of the accident and for an opening at that time a person crossing would travel about two car's length south.

Three freight trains going south passed through Villin on the morning in question between five and seven o'clock, the first two through freight the first at about 6:20 and the second 6:30, and the third a train handling dead freight 6:45, and a train going north at 6:30.

The deceased Johnston on the morning in question, a man 60 years of age, living about 250 feet northwest from depot at about 5:30 left his residence with lantern to go to his place of business on the east side of the track to make fires and get up steam. His usual way was across right of way over cinder path and by depot. That aside from the loss of an eye he was a strong healthy man for his years and had as members of his family at the time a widow, one son, one daughter, unmarried, and one daughter married, wife of appellee, and one grand child. His business was operating a hoop factory from which business he had an income of about \$1,000.00 per year.

It is the contention of appellee that deceased was killed by the first freight train going south that morning in charge of engineer Briggs. The witnesses differ as to the time this train went through and the time Johnston was found lying on the west side of the south bound track from eight to twenty-five

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It is the contention of appellee that deceased was killed by the first freight train going south that morning in charge of engineer Briggs. The witnesses differ as to the time the train went through and the time Johnston was found lying on the west side of the south bound track from eight to twenty-five

feet south of cinder path. Some of the witnesses make it as early as 5:30 and some as late as 6:30 A. M. The important controverted question of fact being the time and the train that hit him. The evidence tending to prove negligence in the operation of these trains is as to the first train passing through Ullin as testified to by train dispatcher at 6:20. The verdict in this case is based upon the second count of the declaration and the jury in effect have by the same verdict found appellant not guilty under the other counts of the declaration. (Aull vs. Swift & Co., 155 App., 638).

The complaint that the second count has not a valid ground for recovery can not be raised at this time if the evidence meets the averments of that count of the declaration as the count after verdict is good although it may state a good cause of action in a defective way.

It is urged by appellant it was error to admit evidence of the construction and use of this cinder path, and the case of Neice vs. C. & A. R. R. Co., 254 Ill., 595, is cited as an authority. The evidence in that case admitted was of entirely different character, it was what the public did in violation of the notice of the company and of their own accord. In the case before this court evidence was offered as to the locality, streets, and cross streets, location of depot and acts of the company in the building of cinder walk tending to prove that the travel of this way was by the company's invitation, which if established by preponderance of the evidence would entitle the deceased to treatment by the company of a person rightfully on this path and under the authority cited from a consideration of this record that evidence was properly admitted.

It is next urged that Johnston was rightfully upon the

test south of cinder path. Some of the witnesses testified early as 5:30 and some as late as 6:30 P. M. The important controverted question of fact being the time and the location of the accident. The evidence tending to prove negligence in the operation of these trains is as to the first train passing the location as testified to by train dispatcher at 6:30. The verdict in this case is based upon the second count of the declaration and the jury in effect have by the same verdict found defendant not guilty under the other counts of the declaration. (A. M. v. Swift & Co., 135 App., 638).

The complaint that the second count was not a valid cause for recovery can not be raised at this time if the evidence meets the averments of that count of the declaration. The count after verdict is good although it may state a good cause of action in a defective way.

It is urged by appellant it was error to admit evidence of the construction and use of this cinder path, and the case of *Neice v. C. & A. R. R. Co.*, 254 Ill., 295, is cited as authority. The evidence in that case admitted was of entirely different character, it was what the public did in violation of the notice of the company and of their own record. In the case before this court evidence was offered as to the location, streets, and cross streets, location of depot and ends of the company in the building of cinder walk tending to prove that the travel of this way was by the company's invitation, and it established by preponderance of the evidence would entitle the deceased to treatment by the company of a person rightfully on this path and under the authority cited from the evidence of this record that evidence was properly admitted. It is next urged that Johnston was rightfully upon the

tracks which was not proven. There was evidence and admitted facts which tended to prove he was rightfully on the tracks or qualifying this statement somewhat where the company is to reasonably expect persons to be.

The contention of appellant therefore that the peremptory instruction presented at the close of appellee's evidence and again at the close of all the evidence should have been given fails. It is not necessary to prove either wanton or wilful negligence, that appellee must prove that appellant through its servants had specific knowledge of an individual on the track or platform or specific ill will toward or an intention to injure an individual, where the servants of the company were running its engine in the dark without a head light or a bell ringing at a high and dangerous rate of speed. While it is true that upon the right of way of the railroad where the public are not invited or authorized to go for the transaction of business with the railroad company those in charge of the train must have knowledge both of the presence of the trespasser and of a dangerous situation, but where depot grounds and platforms, loading shoots, coal sheds provided by the railroad company for the use of the public in the transaction of business where persons have a right to be for legitimate purposes and where they may reasonably be expected, are quite different, and in this case there was sufficient evidence to make the question raised of wanton and wilful negligence a question of fact and the court did not err in submitting the issue to the jury.

The case at bar belongs to that class of cases called a close case upon the facts because the appellee relies upon the negligence in handling of the first of the three trains to recover so that the time of the injury and the passing of the

tracks which were not proven. There was evidence that the facts which tended to prove he was rightfully on the tracks qualifying this statement somewhat where the company could hardly expect persons to be.

The contention of appellant therefore that the jury instruction presented at the close of appellee's evidence and again at the close of all the evidence should have been given is false. It is not necessary to prove either wanton or negligent negligence, that appellee must prove that appellant through his servants had specific knowledge of an individual on the track or platform or specific ill will toward or an intention to injure an individual, where the servants of the company were running the engine in the dark without a head light or a head light at a high and dangerous rate of speed. While it is true that upon the right of way of the railroad where the willful negligence not invited or authorized to go for the transaction of business with the railroad company those in charge of the train were negligent knowledge both of the presence of the trespasser and of the dangerous situation, but where depot grounds and platforms, loading shoots, coal sheds provided by the railroad company for the use of the public in the transaction of business where persons have a right to be for legitimate purposes and where persons reasonably be expected, are quite different, and in this case there was sufficient evidence to make the question raised by wanton and willful negligence a question of fact and the jury did not err in submitting the issue to the jury.

The case at bar belongs to that class of cases called close case upon the facts because the appellee's negligence in handling of the first of the three trains is not covered so that the time of the injury and the cause of it



train, there being no eye witnesses, because it is important to have the testimony of witnesses varying one hour to one and one-half hours upon both propositions. The further fact of the age of deceased with the evidence of his earning capacity would give to this verdict the appearance of being excessive, so that whatever errors may appear must be scrutinized the more closely and held as going to the merits of the case.

Appellant complains of the giving of two instructions for appellee: The ninth reads as follows:

"You are instructed that if you believe <sup>from</sup> a preponderance of the evidence in this case that the defendant carelessly and negligently operated and managed the train in question in manner and form as charged in the declaration, and that such negligence amounted to wanton and wilful negligence as defined in these instructions, and that as a direct result of such wanton and willful negligence the plaintiff's intestate Lewis W. Johnston was struck and killed by said train, then your verdict should be for the plaintiff."

But one count in the declaration either by way of facts or as a conclusion charged negligence wanton and wilful and under this instruction the court gave the jury the right to take the charge of negligence under any of the other counts if in the opinion of the jury the charge came under the definition of wanton and wilful negligence and find defendant guilty. The jury should have been limited in finding defendant guilty of such negligence to second count. This instruction does not pretend to state the facts that constitute wanton and wilful negligence and cannot be justified on that ground. The defini-

train, the being an eye witness, became all important. Have the testimony of witnesses varying one hour to one and one-half hours upon both propositions. The further fact of the age of deceased with the evidence of his earning capacity would give to this verdict the appearance of being excessive, so that whatever errors may appear must be scrutinized the more closely and held as going to the merits of the case.

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tion of wanton and wilful negligence in appellee's sixth and seventh given instructions does not assist the jury in distinguishing the facts under these different counts of declaration. This is a matter of which appellant could not complain and if this error stood alone would not be reversible error. Complaint is made by appellant of the giving of appellee's eleventh and last instruction.

"If you find the defendant guilty as charged from the evidence then upon the question of damages the court instructs you that the plaintiff is not required to testify or produce witnesses who have testified to any specific damage as represented by dollars and cents; nor is the plaintiff required to furnish, in the proofs, any definite or specific basis for the computation of said damages, but that such question is for the jury to determine as practical men according to the evidence and all the facts and circumstances proven in the case."

Under the statute authorizing a jury to fix damages in case they found appellant guilty there could be no defense as to the language used in the latter part of the instruction, because the statute says, you are authorized to give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the wife and next of kin. The statute is the jury's limitation and the basis for computation. With this instruction the doors are opened to a consideration of all facts in evidence not only of pecuniary loss but of the evidence of negligence and the horrors of the killing. This instruction has to be condemned and criticized. (I. C. R. R. Co. vs. Johnson, 221 Ill., 47. *Green Coal & Ice Co. vs. Howell*, 204 Ill., 515. *Iate vs. Gus Blair*

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Coal & Ice Co. vs. Howell, 204 Ill. 513. 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 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2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 2681, 2682, 2683, 2684, 2685, 2686, 2687, 2688, 2689, 2690, 2691, 2692, 2693, 2694, 2695, 2696, 2697, 2698, 2699, 2700, 2701, 2702, 2703, 2704, 2705, 2706, 2707, 2708, 2709, 2710, 2711, 2712, 2713, 2714, 2715, 2716, 2717, 2718, 2719, 2720, 2721, 2722, 2723, 2724, 2725, 2726, 2727, 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3558, 3559, 3560, 3561, 3562, 3563, 3564, 3565, 3566, 3567, 3568, 3569, 3570, 3571, 3572, 3573, 3574, 3575, 3576, 3577, 3578, 3579, 3580, 3581, 3582, 3583, 3584, 3585, 3586, 3587, 3588, 3589, 3590, 3591, 3592, 3593, 3594, 3595, 3596, 3597, 3598, 3599, 3600, 3601, 3602, 3603, 3604, 3605, 3606, 3607, 3608, 3609, 3610, 3611, 3612, 3613, 3614, 3615, 3616, 3617, 3618, 3619, 3620, 3621, 3622, 3623, 3624, 3625, 3626, 3627, 3628, 3629, 3630, 3631, 3632, 3633, 3634, 3635, 3636, 3637, 3638, 3639, 3640, 3641, 3642, 3643, 3644, 3645, 3646, 3647, 3648, 3649, 3650, 3651, 3652, 3653, 3654, 3655, 3656, 3657, 3658, 3659, 3660, 3661, 3662, 3663, 3664, 3665, 3666, 3667, 3668, 3669, 3670, 3671, 3672, 3673, 3674, 3675, 3676, 3677, 3678, 3679, 3680, 3681, 3682, 3683, 3684, 3685, 3686, 3687, 3688, 3689, 3690, 3691, 3692, 3693, 3694, 3695, 3696, 3697, 3698, 3699, 3700, 3701, 3702, 3703, 3704, 3705, 3706, 3707, 3708, 3709, 3710, 3711, 3712, 3713, 3714, 3715, 3716, 3717, 3718, 3719, 3720, 3721, 3722, 3723, 3724, 3725, 3726, 3727, 3728, 3729, 3730, 3731, 3732, 3733, 3734, 3735, 3736, 3737, 3738, 3739, 3740, 3741, 3742, 3743, 3744, 3745, 3746, 3747, 3748, 3749, 3750, 3751, 3752, 3753, 3754, 3755, 3756, 3757, 3758, 3759, 3760, 3761, 3762, 3763, 3764, 3765, 3766, 3767, 3768, 3769, 3770, 3771, 3772, 3773, 3774, 3775, 3776, 3777, 3778, 3779, 3780, 3781, 3782, 3783, 3784, 3785, 3786, 3787, 3788, 3789, 3790, 3791, 3792, 3793, 3794, 3795, 3796, 3797, 3798, 3799, 3800, 3801, 3802, 3803, 3804, 3805, 3806, 3807, 3808, 3809, 3810, 3811, 3812, 3813, 3814, 3815, 3816, 3817, 3818, 3819, 3820, 3821, 3822, 3823, 3824, 3825, 3826, 3827, 3828, 3829, 3830, 3831, 3832, 3833, 3834, 3835, 3836, 3837, 3838, 3839, 3840, 3841, 3842, 3843, 3844, 3845, 3846, 3847, 3848, 3849, 3850, 3851, 3852, 3853, 3854, 3855, 3856, 3857, 3858, 3859, 3860, 3861, 3862, 3863, 3864, 3865, 3866, 3867, 3868, 3869, 3870, 3871, 3872, 3873, 3874, 3875, 3876, 3877, 3878, 3879,

Coal Co., 158 App., 578.)

The appellee recognizes the force of the criticism of these authorities and replies by saying that instruction number eleven is considered with appellee's number ten as neither instruction calls for a finding harmless error at least was committed, in the case of Carney v. Marquette Coal Co., 260 Ill., 116, is cited as an authority in support of this contention. But even if the instructions complained of are set out in the opinion of that case. The court was of the opinion after an examination of the record that there was no reversible error. As to whether the question of damages being excessive was questioned does not appear. It appeared from the opinion to be a question of the defendant being liable. In this case from an examination of instruction ten, if the giving of eleven is error, ten lays <sup>down</sup> a rule or correct and different rule for the jury in assessing damages, not as an aid in considering eleven, but contradictory thereof. Which rule so laid down did the jury follow, one was as plain and broad as the other, 'one as much the law binding upon them as the other, and the damages allowed by them would indicate they ~~It is said by appellee no finding was called for under eleven and that had followed the most liberal one of the two (eleven).~~ It does not pretend to direct a verdict. It does call upon the jury to determine the amount of damages. The court will assume that all other questions to be determined by the jury to make one responsible for damages had been determined by the jury, and that they were ready to consider this instruction and that does not put this instruction beyond criticism.

The question of the first fast freight being the train that caused the injury in this case being, the close question to be determined, coupled with the fact that the verdict is large amount, are considered by the court in holding that the errors go to the merits of the case.

Therefore for the reasons given the judgment will be reversed and cause remanded.

Reversed and remanded.

(Not to be reported in full.)

The appellee recovers the force of his criticism  
authorities and reply by stating that the instruction  
is considered with appellee's answer that the instruction  
calls for a finding harmless error of fact was not  
the case of Garney v. Harquette Coal Co., 200 Ill., 10, 11  
ited as an authority in support of this contention.  
the instructions complained of are set out in the opinion  
that case. The court was of the opinion after an examination  
the record that there was no reversible error. As to the  
the question of damages being excessive was questioned, and  
appear. It appeared from the opinion to be a question of  
defendant being liable. In this case from an examination  
instruction ten, if the giving of eleven is error, the  
er correct and different rule for the jury in assessing damages,  
not as an aid in considering eleven, but contradictory thereof.  
Which rule as laid down did the jury follow, one was as  
and broad as the other, one as much the law binding upon them  
the other, and the damages allowed by them would indicate that  
had followed the most liberal one of the two. *It is not by itself reversible error for the court to follow the most liberal one of the two.*  
not pretend to direct a verdict. It does only in order to de-  
termine the amount of damages. The court will assume that  
other questions to be determined by the jury to make a  
responsible for damages had been determined by the jury and  
they were ready to consider this instruction and that the  
but this instruction beyond criticism.  
The question of the first trial being set aside, the first  
caused the injury in this case being the cause of the  
determined, coupled with the fact that the verdict is for  
amount, are considered by the court in holding that the  
errors go to the merits of the case.  
Therefore for the reasons given the judgment will be re-  
versed and cause remanded.

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 25<sup>th</sup> day of July  
A. D. 1914

*A. C. Millspaugh*  
Clerk of the Appellate Court

# OPINION

*Free \$*

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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff

And afterwards in Vacation, after said March term, to-wit: On the 21<sup>st</sup> day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

The F. W. Cook  
Brng Co.

~~SHOROT~~  
APPEAL FROM

188 I.A. 397

Circuit

COURT

vs.

No. 12

March Term, 1911.

Williamson

COUNTY

Yaccaro

et al

TRIAL JUDGE

Hon. W. W. Clement



Term No. 12.

March 10, 1914.

March Term, A. D. 1914.

No. 272

F. W. Cook Brewing Company,  
Appellant,  
vs.  
Mike Vaccaro,  
Appellee.)

Appeal from the  
Circuit Court of  
Williamson County.

No. 273.

F. W. Cook Brewing Company,  
Appellant,  
vs.  
Domeneco Rodasta and Antonio  
Vaccaro,  
Appellees.)

188 I.A. 397

Appeal from the  
Circuit Court of  
Williamson County.

McBride, J.

The above entitled causes were consolidated and tried by the court without a jury, by consent, and at the conclusion of the trial the Circuit Judge rendered judgment against the plaintiff for costs. The plaintiff appeals and the two cases are now on agreement abtracted, argued and tried in this court together. In the abstract the former case is denominated as case No. 272, and the latter case as No. 273. The two cases grow out of one order based upon the same contract.

In No. 272, Mike Vaccaro is sued as principal and in No. 273 the appellees are sued as sureties upon the Mike Vaccaro contract. On the 7th day of May 1909, Mike Vaccaro at Evansville, City, Illinois, executed and forwarded to the appellant at Evansville, Indiana, the following agreement, the execution of which was completed on May 9, 1909, at Evansville, Indiana, by the appellant approving and signing the contract:

"This agreement made and entered into this 7th day of May, 1909, by and between the F. W. Cook Brewing Company, of Evansville,

March Term, 1914.

No. 272.

I. W. Cook Brewing Company,  
Appellant,  
vs.  
Mike Vaccaro,  
Appellee.

A bill for the  
costs of the  
litigation.

No. 273.

I. W. Cook Brewing Company,  
Appellant,  
vs.  
Domeneo Rodasta and Antonio  
Vaccaro,  
Appellees.

1887. A. 1887.  
A bill for the  
costs of the  
litigation.

McBride, J.

The above entitled causes were consolidated for trial  
the court without a jury, by consent, and at the trial  
the trial the circuit judge rendered judgment against the  
all for costs. The plaintiff appeals and the court  
agreement abstracted, argued and tried in this court.  
In the abstract the former case is designated as No. 272  
and the latter case as No. 273. The two cases were  
order based upon the same contract.

In No. 272, Mike Vaccaro is sued as plaintiff  
273 the appellee are sued as appellees upon the same  
contract. On the 17th day of May 1907, the Vaccaro  
City, Illinois, executed and forwarded to the City of  
ville, Indiana, the following agreement, to wit:  
was completed on May 2, 1907, at Evansville, Indiana,  
plaintiff approving and signing the contract.  
"This agreement made and entered into  
1907, by and between the

ville, Indiana, and Mike Vaccaro, witness. . . . .  
Brewing Company hereby agrees to give the said Mike Vaccaro the  
exclusive privilege of selling its draught and bottle beer  
at wholesale in said town of Johnston City, Illinois, and agrees  
to sell and deliver to him its beers g. c. b. cases at Johnston  
City, Illinois, in car load lots at the following prices: . . . .  
..... And the said Brewing Company agrees to pay  
freight on empty cooperage cases and boxes returned to it  
the said Mike Vaccaro, and furnish ample ice for preservation  
of the draught beer in transit, and make allowances and give  
credit for all bottle beer cases and bottles returned to it.  
.....

It is <sup>well</sup> understood that the said Brewing Company shall not  
be expected to make any payments or allowances not herein spe-  
cified. And the said Mike Vaccaro agrees to make settlements  
and payments whenever demanded by the said Brewing Company, or  
its representatives; take good care of all property of the said  
Brewing Company intrusted in his care, give special attention  
to gathering up and returning of all empty cooperage and main-  
taining the continuance of this agreement he will neither sell  
be direct or indirectly interested in the sale of any beer  
other than that of the said Brewing Company.

This agreement shall not be binding upon said Brewing  
Company until the same has been approved by its President, Vice  
President or Secretary and Treasurer, and its corporate seal  
affixed at Evansville Indiana. This agreement may be termina-  
ted by either party upon ten days notice by either party in  
writing."

Upon the back of the foregoing instrument there is written:

village, Indiana, and like persons, witnesses.  
 Brewing Company hereby agrees to give the said  
 exclusive privilege of selling the draught and bottle  
 at wholesale in said town of Johnston, Indiana,  
 to sell and deliver to him the beer of the said  
 City, Illinois, in car load lots at the following prices:  
 and the said Brewing Company agrees to  
 freight on empty cooperage crates and boxes returned to  
 the said Mike Vaccaro, and turn in empty beer for  
 of the draught beer in transit, and make allowances  
 credit for all bottle beer cases and other expenses.

It is understood that the said Brewing Company shall  
 be expected to make any payments or allowances or expenses  
 called. And the said Mike Vaccaro agrees to the receipt of  
 and payments whenever demanded by the said Brewing Company,  
 its representatives; take good care of all property of the  
 Brewing Company intrusted in his care, give special attention  
 to gathering up and returning of its empty cooperage  
 and the continuance of this agreement he will not be  
 be direct or indirectly interested in the sale of  
 other than that of the said Brewing Company.

This agreement shall not be binding upon said  
 Company until the same has been approved by its President,  
 President or Secretary and Treasurer, and its corporate seal  
 affixed at Evansville, Indiana. This agreement may be  
 voided by either party upon ten days notice by either  
 written.

Upon the back of the foregoing instrument

dorsed an agreement by Domenico Rodasta and [redacted] to stand as sureties, "In a sum not to exceed one thousand dollars for the faithful performance by the said Mike Vaccaro of all of the agreements and conditions contained in [redacted] agreement, hereby guaranteeing that the said Mike Vaccaro shall pay said Brewing Company all sums which shall become due from it to it for beer sold to him, including case, and bottles, well as for saloon fixtures and other merchandise. [redacted] remain and continue surety for the faithful performance by said Mike Vaccaro of the conditions and agreements above referred to, and the failure of the said Brewing Company to collect the sureties of any violations of the said agreement by the said Mike Vaccaro shall not release said sureties from liability for subsequent violations. Dated May 7, 1909".

It is stipulated by the parties herein that as a result of an election under the local option statute of the State of Illinois, Johnston City became dry territory in December 1909 and remained "dry" until May 1910. In a letter bearing date of May 7, 1909, Mike Vaccaro, after executing the above contract transmitted it to appellant and in such letter ordered one car of beer to be sent at once, if the bond was satisfactory. Appellant forwarded the beer to Mike Vaccaro and said to ship it thereon to Johnston City, Illinois. Thereafter Mike Vaccaro gave frequent orders of car loads of beer, some of which were shipped to him direct and others to the Circolo Popolare Club, directed by Mike Vaccaro. This shipping of beer continued after May, 1910, at which time Johnston City again became dry territory. The total shipments of beer made by appellant to Mike Vaccaro amount to \$26,848.20; the last shipment was made on March 4, 1911. Payments were made up on the [redacted]

attached in agreement with the above-mentioned  
stand as aforesaid, "in a suit not to exceed  
laws for the faithful performance of the same, and  
all of the agreements and conditions contained  
herein, hereby guaranteeing that the said Mike Vascaro  
said Brewing Company all sums which shall become due to it  
to it for beer sold to him, including interest, and  
well as for saloon fixtures and other articles,  
remain and continue surety for the faithful performance of  
Mike Vascaro of the conditions and agreements above referred  
to, and the failure of the said Brewing Company to comply with  
sureties of any violations of the said agreement by the said  
Mike Vascaro shall not release said sureties from liability  
for subsequent violations, dated May 7, 1909.

It is stipulated by the parties herein that the  
of an election under the local option statute of the State of  
Illinois, Johnston City became dry territory in December, 1908,  
and remained "dry" until May 1910. In a letter bearing date  
of May 7, 1909, Mike Vascaro, after explaining the above-mentioned  
facts transmitted it to appellant and in such letter stated that  
one car of beer to be sent at once, if it could be obtained.  
Appellant forwarded the beer to Mike Vascaro and same was  
thereon to Johnston City, Illinois. Thereafter Mike Vascaro  
frequent orders of car loads of beer, some of which were  
ped to him direct and others to the Chicago territory, as  
directed by Mike Vascaro. This shipping of beer was continued  
after May, 1910, at which time Johnston City was made a  
territory. The total shipments of beer made to Johnston City  
Mike Vascaro amount to \$6,141.00, the first of which was  
made on March 4, 1911. Thereafter were the



from time to time amounting to \$5,587.18; there remained a balance of \$1,560.50 due from appellee to appellant, to recover which the suits were instituted.

We will first dispose of the case against appellee, No. 272, wherein he is sued as principal. The declaration filed consisted of the common law counts.

It is contended by appellee that as the contract provided that the beer should be furnished f. o. b. cars at Johnston City, Illinois, that the title remained in the appellant until its arrival at Johnston City, and that this was a delivery by appellant to appellee at Johnston City and constituted a sale at Johnston City in violation of the local option laws of Illinois, and rendered the contract void and that no recovery could be had upon such contract for any of the beer shipped.

We agree with the contention of counsel for appellee, that as the contract provided that the beer should be delivered f. o. b. cars at Johnston City that it contemplated a delivery at this place. There is no doubt but the general rule is that in the absence of an agreement as to the place of delivery, the delivery by the vendor to a common carrier is a delivery to the vendee at the place at which the common carrier received the goods and that the title to the property vests in the purchaser immediately upon such delivery to the carrier. See *Carthage vs. Duval*, 99 Ill., 234. If, however, the contract provides that the shipment shall be f. o. b. cars at the vendee's home, or place of business, then the delivery to a common carrier will not be a delivery to the vendee, but must be delivered to vendee at his home or place of business before the title is vested in the vendee. See *W. & A. Co. vs. Lumber Company*, 126 App., 253.

any. 106 Jan. 1951.

We are in accord with the contention of appellant's counsel that under the contract and payment of \$100,000, appellant delivered the beer to the appellee on car load lots, on board the cars at Johnston City, Illinois, and that if such sale was in violation of and prohibited by the local option laws of this state, there could be no recovery. It appears from the evidence that the contract was accepted and its execution completed at Evansville, Indiana, and provided for the delivery of the beer to the ~~cars~~ cars at Johnston, City, Illinois, and the question now presented for our determination is, Does the sale and delivery in the manner herein provided violate the local option laws of Illinois? As this beer was shipped from the state of Indiana into the State of Illinois, it was undoubtedly an interstate shipment and for this reason counsel for appellant contend that such shipment and delivery is not in violation of the local option laws of this state, and that it is protected and exempted from the provisions of this statute by the Constitution of the United States, which provides, "The Congress shall have power ..... to regulate commerce with foreign nations and among the several states and with the Indian tribes." It has been uniformly held by the Supreme Court of the United States that the citizens of any state have the right to sell and ship any article of commerce to a citizen of another state, unless prohibited from so doing by act of congress. Another established doctrine of this court is, that where the power of Congress to regulate is exclusive, the failure of congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions, and any regulation of the subject by the states, except in matters

"We are in accord with the contention that the contract was made under the contract and payment of freight, and that appellant delivered the beer to the appellant, on board the cars at Johnston City, and that if such sale was in violation of the law, there could be no recovery. It appears from the contract that the contract was accepted and the execution completed at Alton, Illinois, and provided for the delivery of the beer to the appellant at Johnston City, Illinois, and the question presented for our determination is, does the sale and delivery in the manner herein provided violate the local law of Illinois? As this beer was shipped from the State of Illinois into the State of Illinois, it was undoubtedly an interstate shipment and for this reason counsel for appellant contend that such shipment and delivery is not in violation of the law of this State, and that it is protected and exempted from the provisions of this statute by the Constitution of the United States, which provides, "The Congress shall have power . . . to regulate commerce with foreign nations and among the several States and with the Indian Tribes." It has been uniformly held by the Supreme Court of the United States that the citizens of any State have the right to sell and ship any article of commerce to a citizen of another State, unless prohibited from so doing by act of Congress. Another established doctrine of this Court is, that where the power to regulate is exclusive, the failure of Congress to make express regulations indicates the will that the subject shall be left free from any restrictions or impositions, and any regulation of the subject by the States, except in a case

of local concern only, as hereafter mentioned, is relevant to such freedom." *Robbins vs. Taxing District of Leisy Co.*, 136 U. S., p. 696.

It is quite clear, as we think, that until prohibited by Congress, any citizen may ship beer or other articles of commerce from one state into another.

The next question that arises is, what prohibition or regulation had Congress made, if any, prior to the making of this contract, and the shipping of this beer? The only regulation pointed out to us or that we have in our research been able to find is an act of Congress passed August 8, 1890, which provides, "That all fermented, distilled or other intoxicating liquors or liquids transported into any state or territory or remain therein for use, consumption, sale or storage therein, shall upon arrival in said state or territory be subject, to the operation and effect of the law of such state or territory, enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not exempt therefrom by reason of being introduced therein in original packages or otherwise." Prior to this enactment of Congress, it was held by the Supreme Court of the United States that in the shipment made by the citizen of one state into another, that as long as it remained in the original package the importer could sell it, notwithstanding such sale was prohibited by a statute of the state into which it was shipped. *Leisy vs. Hardin*, 136 U. S., 100. After the passage of the act of Congress above referred to, it was claimed that by such act, that as soon as the intoxicating liquors came within the borders of the state to which they were imported, that they were at once subject to the

of local concern only, as heretofore mentioned, in the  
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 as it remained in the original package the importer could sell  
 it, notwithstanding such sale was prohibited by a state or  
 state into which it was shipped. Levy vs. Davidson, 125 U. S.  
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 to, it was claimed that by such act, that as soon as the  
 intoxicating liquors came within the borders of the state  
 which they were imported, that they were at once subject to the

control of the state law prohibiting a delivery of them, and a construction of this act was given by the Supreme Court of the United States in the case of *Rhodes vs. State of Iowa*, 170 U. S., 412, in which it is said, "The *Bowman* case was decided in 1888, the opinion in *Leisy vs. Hardin* was announced in April, 1890, the act ~~was~~ under consideration was ~~passed~~ August 8, 1890. Considering these dates it is reasonable to infer that the provisions of the act were intended by Congress to cause the legislative authority of the respective states to attach to intoxicating liquors coming into the states by interstate shipment only after the consummation of the shipment, but before the sale of the merchandise, that is, that the one receiving merchandise of the character named, whilst retaining the full right to use the same, should no longer enjoy the right to sell free from the restrictions as to sale created by state legislation, a right which the decision in *Leisy vs. Hardin* had just previously declared to exist." And the Supreme Court, in giving its conclusions in this case further says, "We think that interpreting the statute by the light of all its provisions, it was not intended to and did not cede the power of the state to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee, and of course this conclusion renders it entirely unnecessary to consider whether if the act of Congress had submitted the right to make interstate commerce shipments to state control it would be repugnant to the Constitution." Shortly after the adoption of our local option statute its constitutionality was attacked and many points were presented to the Supreme Court of the State of Illinois for de-

control of the state law prohibiting a delivery of goods, a construction of this act was given by the United States in the case of *Windsor vs. State of New York*, 10 U. S., 412, in which it is said, "The law was passed in 1838, the opinion in *Leisy vs. Hardin* was announced April, 1890, the act was under consideration August 8, 1890. Considering these dates it is reasonable to infer that the provisions of the act were intended to cause the legislative authority of the respective states to attach to interstate shipping property coming into the state, interstate shipment only after the consummation of the shipment, but before the sale of the merchandise, that is, that the one receiving merchandise of the character named, retaining the full right to use the same, would not enjoy the right to sell free from the restrictions as to interstate shipment, a right which the decision in *Leisy vs. Hardin* had just previously declared to exist. The Supreme Court, in giving its conclusion in this case, says, 'We think that interpreting the statute by the intent of all its provisions, it was not intended to and did not deprive the power of the state to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination, delivery there to the consignee, and of course this construction renders it entirely unnecessary to consider whether it is not of Congress had submitted the right to make interstate shipments interstate control it would be reasonable to the Constitution.' Shortly after the adoption of our local option act its constitutionality was attacked and the case was presented to the Supreme Court of the United States in 1897.



ing its validity, and among them the point was made that the local option act was in violation of the interstate commerce clause of the Federal Constitution, and in passing upon that question the Supreme Court says, "Another point made by counsel is, that the act violates the interstate commerce clause of the Federal constitution, and although that question is not involved in this case and any invalidity of the provision would not effect the act, the position of counsel is not tenable. In the section designed to prevent evasion of the act it is provided that the taking of orders or the making of agreements in anti-saloon territory for the sale or delivery of intoxicating liquors shall be held to be an unlawful selling. We are required to interpret the act in such a way as to uphold it rather than in a way which would invalidate it, (People ex rel vs. Hinrichsen, 161 Ill., 223), and it is always presumed that the legislature did not intend to exceed, and have not, in fact, exceeded, their jurisdiction. (Endlich on Interpretation of Statutes, Sec. 171; Stanton vs. City of Chicago, 154 Ill., 23). It is not necessary every time a law is passed that the legislature should specifically state that there is no intent to interfere with inter-State commerce or some other subject of which they have no jurisdiction. The act does not purport to control in any manner the importation of liquor from other states." People vs. McBride, 234 Ill., 176.

It is contended by counsel for appellee that, "A contract made in one state for the sale of liquor in another, such as would be valid at common law, and which is not shown to be invalid, where made, will enable the seller to obtain an action for the price in the state where delivery is made, not that he

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 states." People vs. McBride, 234 Ill. 196.  
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 would be valid at common law, and which is not shown to be in-  
 valid, where made, will enable the seller to obtain an order  
 for the price in the state where delivery is made, notwithstanding

ing, if made in the latter state the contract would have been void. But this rule is of no avail in the face of statutes, such as have been enacted in several states providing that there shall be no recovery on a contract of this kind when the purchaser buys with a view to violating the laws of his own state, although the contract would have been good where made." We do not regard this rule of law as applicable, as there is no statute in Illinois prohibiting a recovery under such circumstances. The Supreme Court of Illinois, in passing upon a kindred question with reference to the transportation of liquors from another state into this state, says, in classifying the different kinds of nuisances enumerates three and says the second consists of "Those which in their nature are not nuisances but may become so by reason of their locality, surroundings or the manner in which they may be conducted, managed, etc." ..... And later on in the opinion says, "As we view this case, under the stipulations in this record the transaction properly falls within the second class of nuisances as above classified, and could only become a nuisance from the manner in which it might be conducted, managed, etc. The right of the citizen to purchase goods for his own consumption from dealers in other States, and the right to have those goods carried and delivered to him, are to be classed among the highest rights of the citizen, and can only be curtailed when, in the manner of conducting the business, they may endanger the health, life or property of other citizens. There is nothing in intoxicating liquor inherently dangerous. It can only be said to be dangerous to those who use it. It is not like explosives or dangerous drugs, that may carry with them a

ing, it made in the latter state the contract void. But this rule is of no avail in the latter state, such as have been enacted in several states providing there shall be no recovery on a contract of sale made by the purchaser buys with a view to violating the law of his own state, although the contract would have been good had it been made. We do not regard this rule of law as applicable, there is no statute in Illinois prohibiting a recovery in such circumstances. The Supreme Court of Illinois, in holding upon a kindred question with reference to the transportation of liquors from another state into this state, says, in discussing the different kinds of nuisances enumerated above and the second consists of "those which in their nature are not nuisances but may become so by reason of their locality, surroundings or the manner in which they may be conducted, etc." And later on in the opinion says, "As we view this case, under the stipulations in this record the transaction properly falls within the second class of nuisances as above classified, and could only become a nuisance from the manner in which it might be conducted, etc." The right of the citizen to purchase goods for his own consumption from dealers in other states, and the right to have those goods carried and delivered to him, are to be classed among the highest rights of the citizen, and can only be curtailed when, in the manner of conducting the business, they endanger the health, life or property of other citizens. There is nothing in intoxicating liquors inherently dangerous, only be said to be dangerous to those who use it. Like explosives or dangerous drugs, they may carry with them

menace to the persons and property of others, and there is nothing in the stipulation to disclose that the business conducted was other than the ordinary course in relation to the carrying and delivering of other articles of trade and commerce that might be, and ordinarily are, carried by such companies. In other words, there is nothing to show that in the method of delivering or in the manner of conducting the business there was anything that could be said to be offensive to the public morals or good order, or could in any way tend to disturb anybody in his tranquility of mind, health or body, safety or right of property. In the absence of such showing it cannot be successfully contended that such business or transaction may be declared to be a nuisance." City of Carthage vs. Munsel, 203 Ill., 478.

From the views above expressed by our Supreme Court, with reference to the business of selling intoxicating liquors, we are of the opinion that even though liquors are purchased and imported into this state that the fact that the vendor is known that it was the intention of the purchaser to sell to unlawfully, that such knowledge would not bar a recovery by the vendor unless there was a statute prohibiting a recovery under such conditions.

We are of the opinion that the court erred in rendering judgment against the plaintiff for costs and for the reasons above set forth the judgment is reversed and the cause remanded.

REVEREND JUDGE

(To be reported in full.)

The case of F. W. Cook Brewing Co. vs. Greeneco, et al. and Antonia Vaccaro, No. 273, depends upon the validity of the

menace to the persons and property of others, nothing in the stipulation to disclose that the business was other than the ordinary course of business in the carrying and delivering of other articles of commerce that might be, and ordinarily are, carried by companies. In other words, there is nothing to show that the method of delivering or in the manner of conducting business there was anything that could be said to be a nuisance to the public morals or good order, or could in any way be said to disturb anybody in his tranquility of mind, health, safety or right of property. In the absence of such evidence cannot be successfully contended that such business is a nuisance. City of Chicago v. City of New York, 203 Ill. 478.

From the views above expressed by our Supreme Court, reference to the business of selling intoxicating liquors, are of the opinion that even though liquor is sold and imported into this state that the fact that the vendor knew that it was the intention of the purchaser to use it unlawfully, that such knowledge would not be a defense to the vendor unless there was a statute providing otherwise under such conditions.

We are of the opinion that the court erred in reversing judgment against the plaintiff for costs and for the reasons above set forth the judgment is reversed and the costs awarded. REVERSED.

(To be reported in full.)

The case of F. W. Cook v. F. W. Cook, No. 273, depends upon the case of Antonia v. F. W. Cook, No. 272, reported in full.

contract entered into by Mike Vaccaro with [redacted] at, upon which they were sureties, and as we have found in the former case that this contract is legal and binding upon the [redacted] we see no reason why it is not also binding upon her brother, the appellees in this case, and can see no reason why they are not liable for whatever amount is ascertained that Mike Vaccaro has failed to pay, and for the reasons set forth in the above opinion the judgment in this case is also reversed and remanded.

REVEREND A. B. R. [redacted]

(Not to be reported in full.)

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(See page 10 for order in No. 172.)

contract entered into by the Vascaro with the ...  
 which they were executed, and as we have found in the ...  
 case that this contract is legal and binding upon the Vascaro ...  
 we see no reason why it is not also binding upon the ...  
 the appellees in this case, and can see no reason why ...  
 not liable for whatever amount is ascertained that the ...  
 Vascaro has failed to pay, and for the reasons set forth in ...  
 the above opinion the judgment in this case is also reversed ...  
 and remanded.

REVEREND AND HONORABLE

(Not to be reported in full.)

REVEREND AND HONORABLE

REVEREND AND HONORABLE

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(See page 10 for order in No. 232.)



I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court  
at Mt. Vernon, this 26<sup>th</sup> day of July,  
A. D. 1914.

Clerk of the Appellate Court

# OPINION

Fee \$

123

1202-1/31

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSAUGH, Clerk.

W. S. PAYNE, Sheriff

And afterwards in Vacation, after said March term, to-wit: On the 28th day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Young

~~ERROR TO~~  
APPEAL FROM

188 I.A. 403

No. 21

vs.

Plaint

COURT

March Term, 1914.

St Clair

COUNTY

E. St. L. & Dub. Ry. Co.

TRIAL JUDGE

Hon. W. E. A. [unclear]



Term No. 21.

Volume 10.

March Term 1913.

August Young,

Appellee,

vs.

East St. Louis & Suburban  
Railway Company,

Appellant.

Appeal from the  
Court of St. Clair County.

133 403

Mc Bride, J.

It appears from the record in this case that the appellee  
instituted a suit against appellant at the September Term,  
1913, of the Circuit Court of St. Clair County, Illinois.  
A declaration was filed alleging that appellee was injured  
reason of the negligence of appellant, and the cause was  
set for trial on the 21st of October, 1913, and that before the  
time of the instituting of said suit and the date set for  
trial appellee settled his cause with appellant for the  
amount of \$275.00, and agreed to dismiss his suit and pay  
costs. Appellant paid appellee the \$275.00 and appellee  
executed an agreement releasing appellant from any further liability,  
and it was further provided in said agreement that appellee  
was to dismiss the aforesaid suit at his cost. On the day set  
for trial the appellee failed to appear and a motion was  
proposed by appellant to dismiss the suit for want of prosecu-  
tion, and for judgment against the plaintiff for costs.  
In support of such motion presented a release and agreement  
containing the provision above set forth. The court ordered  
to dismiss the suit at cost of plaintiff and award of costs.

Alameda Co. 11

Term No. 11

March Term 1911

August Young,  
Appellee,  
vs.  
East of Louisiana & Arkansas  
Railway Company,  
Appellant.

Appeal from the District  
Court of Alameda County.

1911, 1912

The People, J.

It appears from the record in this case that the  
instituted a suit against appellant at the September term,  
1912, of the District Court of Alameda County, Alameda.  
Decision was filed alleging that appellee was negligent  
reason of the negligence of appellant, and the cause was set  
for trial on the 10th of October, 1912, and that before the  
time of the instituting of said suit and the date set for  
trial appellee settled his cause with appellant for the  
amount of \$275.00, and agreed to dismiss the suit and pay  
costs. Appellant paid appellee the \$275.00 and appellee  
an agreement releasing appellant from any further liability,  
and it was further provided in said agreement that appellee  
was to dismiss the cause at his cost. On the 10th of October,  
for trial the appellee failed to appear and a writ of seque-  
strum was issued against the suit for want of prosecution.  
and for judgment against the plaintiff for costs and  
in support of such motion, presented a reference and report  
containing the provision above set forth. The court, in  
to dismiss the suit at cost of plaintiff's motion.

that the plaintiff was insolvent and that the court, of its own motion rendered judgment against the plaintiff (appellant here) for costs; to save which, the plaintiff prosecutes this appeal.

It does not appear from the record that the plaintiff was insolvent prior to the commencement of the suit, nor that the court to prosecute as a poor person. And, in fact, the court not permit the court to render a judgment against the plaintiff for costs, under the agreement herein presented. It is provided by Section 8, Chapter 25 of Florida Revised Statutes, that if the plaintiff be non-suited or fail to prosecute his suit, that the defendant shall have judgment against the plaintiff for costs.

It was the duty of the court upon the presentation of the agreement, if properly identified, to dismiss the suit and award the cost of the plaintiff, unless an order had been entered requiring the plaintiff, ~~whether~~ to prosecute as a poor person. The plaintiff was in default, failed to prosecute his suit, and so the court would have no authority whatever to render a judgment against the defendant for costs.

We think the court erred in rendering judgment against the defendant for costs, and the judgment of the lower court is reversed.

Judgment reversed.

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(Not to be reported in full)

that the plaintiff was not...  
of its own motion rendered judgment against the defendant.  
(appellant here) for costs; to reverse which judgment  
proceeded this appeal.

It does not appear from the record that the court  
prior to the commencement of the suit, took any action  
count to prosecute as a poor person. The court, however,  
not permit the count to remain a judgment against the  
for costs, under the circumstances herein presented.  
by Section 8, Chapter 52 of the Revised Statutes, that  
the plaintiff be non-suited or take the case off the  
that the defendant shall have judgment to reverse the  
It is the duty of the court, when the facts are  
agreement, to properly identify, in substance, the  
cost of the plaintiff, unless an order has been made  
ing the plaintiff, unless an order has been made  
plaintiff was in default, failed to prosecute its suit, and  
so the court would have no authority whatever to render a judg-  
ment against the defendant for costs.

We think the court erred in rendering judgment against  
defendant for costs, and the judgment of the lower court is  
reversed.

Ludwig and Moore.

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(Not to be reported in full)



I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court  
at Mt. Vernon, this 26th day of July  
A. D. 1914.

Clerk of the Appellate Court

# OPINION

*Fee \$*

123 1311

# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff

And afterwards in Vacation, after said March term, to-wit: On the 27th day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

John of Canteen

~~ERROR TO~~  
APPEAL FROM

188 I.A. 405

vs.

No. 26

City

COURT

March Term, 1914.

St. Louis

COUNTY

Mubar

et al

TRIAL JUDGE

Hon.

M. W. Underwood



Form 26.

March Term 1914.

Town of Canteen, )  
Appellant, )  
Vs. )  
Fred Weber and )  
Martha Weber, )  
Appellee. )

Appeal from the circuit court of  
St. Clair County, Illinois.

1881 405

Mc Bride, J.

Appellant instituted a prosecution against the appellees on December 23, 1912, for obstructing a highway known as the Cookson Road in Canteen Township, St. Clair County, Illinois. The charge is, that the appellees built a fence in the middle of the road covering one half of the road and extending about three hundred feet in the road parallel with the road, and that this obstruction was placed there during the month of June 1912, and that appellees had been notified verbally, and the appellee, Fred Weber, in writing, to remove this obstruction.

It further appears that they promised to remove the obstruction if ten days time were given them, but after waiting longer than the ten days they failed to remove the obstruction, and therefore this suit was instituted.

The penalty sought to be recovered is under Section 2, Chapter 121 of Burd's Revised Statute of Illinois, which reads: "If any person shall injure or obstruct a public road, by cutting a tree, or trees in, upon or across the same, or by blocking or leaving any other obstruction thereon, or encroaching upon the same with any fence, etc. \*\*\*\*\* shall forfeit for each such offense a sum not less than three dollars, nor more than ten dollars". The Section also provides that in case of failure to

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Appellant instructed a "personnel agent" to call the Sheriff on December 28, 1972, for obstructing a highway. Jackson was in Canton Township, Jackson Court, Illinois. Charge is, that the appellees built a fence in the middle of the road covering one half of the road and extending out into the road, and the appellees carried with the road, and the appellees placed there during the month of June 1972, that appellees had been notified verbally, and the appellees, in writing, to remove this obstruction.

and therefore they will be constituted.

longer than the ten days they failed to remove the container and  
tion if ten days were given them, but after a testing period

It further appears that their promises to remove the container

The penalty sought to be recovered is under section 107 of Chapter 181 of Hurd's Revised Statute of Illinois, which reads:

"If any person shall injure or destroy a public road, or a tree, or trees in, upon or across the same, or willfully leave any other obstruction thereon, or remove any such name with any fence, etc., he shall forfeit to the State as much as five dollars."

The fact that the above statute is a criminal one does not prevent it from being applied to a civil action.

not exceeding three dollars per day for each day of obstruction shall remain after having been assessed for the same by the commissioners.

The case was tried before a jury and a verdict was found finding the defendants not guilty. The plaintiff brings this appeal.

The appellant assigns as error that the verdict of the jury is contrary to the evidence and the law. That the court erred in giving appellee instruction No. 1 and that the court erred in overruling appellant's motion for a new trial.

While other errors have been assigned, these are the only ones that we think it necessary to notice in the determination of this case. While it is true that all of the errors so mentioned have not been argued specifically by appellant, yet when considered in their relation to the argument case it will be necessary to pass upon all of them. It is insisted by counsel for appellant, and we think properly, that the verdict of the jury is manifestly against the weight of the evidence, and in determining this question it is proper to notice the facts upon which this case was tried. We are of the opinion that the case was tried upon an incorrect theory as to the period within which a road must be used by the public to constitute it a public highway. Both parties have presented the case upon the theory that twenty years user was necessary to make this a public highway. This is a mistaken view of the law. Section 1, Chapter 121, Hurd's Revised Statutes which has been in force since July 1st, 1887, provides "That all roads in this State which have been laid out in pursuance of any law of this State or of the territory of Illinois, or which have been dedicated by dedication or used by the public as a highway for twenty years, and which have not been vacated in pursuance of any law

not exceeding three dollars for any one day, and the  
obstruction shall remain after having been removed, and the  
same by the circumstances.  
The case was tried before a jury, and a verdict was  
finding the defendants not guilty. The plaintiff moved  
this appeal.  
The appellant assigns as error that the verdict  
jury is contrary to the evidence and the law. That the jury  
erred in giving appellee instruction 10, 11 and 12, and that the jury  
erred in overruling appellee's motion for a new trial.  
While other errors have been assigned, we think that the  
ones that we think it necessary to notice in the case are  
of this case. While it is true that all of the errors  
mentioned have not been argued specifically by appellant, but  
when considered in their relation to the argument made in this  
be necessary to pass upon all of them. As to instruction 10,  
and for appellant, and we think properly, that the verdict  
the jury is manifestly against the weight of the evidence, and  
in determining this question it is proper to notice the error  
upon which this case was tried. We are of the opinion that the  
case was tried upon an incorrect theory, as in the finding that  
which a road must be used by the public to constitute the  
public highway. Both parties have presented the case upon the  
theory that twenty years were necessary to create a public  
a public highway. This is a mistaken view of the law. In  
1, Chapter 101, Hurd's Revised Statutes which has been in force  
since July 1st, 1887, provides "That all roads in this State  
which have been laid out in pursuance of any law of this State  
or of the territory of Illinois, or which have been authorized  
by dedication or used by the public as a highway for the last  
years, and which have not been accepted in pursuance of the law of



herby declared to be public highways', and the Supreme Court has sustained the doctrine that since the enactment of the statute a period of user for fifteen years is all that is required. City of Chicago vs. Pauli--224 Ill., 411.

The instruction given by the court in behalf of the appellee advises the jury that to constitute this road a public highway, it was necessary that it should be used as a road for a period of at least twenty years. This, it will be observed, is not in accordance with the statute, and much of the testimony introduced upon the trial of this case fixes the period during which this road had been used as a highway at from eight to twenty years; and the testimony of one of the witnesses, who appeared to give the most definite information with reference to the use of this highway, fixes it at sixteen years, and under this instruction of testimony together with that of other witnesses would be entirely ignored. The witness, Louis Murdin, said he traveled over this road and known it for fifteen, probably twenty years, and that during that time it was of the width of sixty feet. J.J. Groves said, "We traveled it for the last forty years, over the identical place in dispute here". Carl Olvig says, "I traveled over it with my produce; the width of it was sixty feet; it was used by the public for its full width. People would occasionally use different parts of it when the road was bad, it was a sixty foot road. It had been used for that width for the past sixteen or seventeen years. For fifteen years I have traveled over it myself". Other witnesses also testified to the use of this road for periods ranging from four to twenty years and this fact is not disputed by the evidence of the appellee but it seems to be practically conceded that the road had been traveled at least from fifteen to twenty years, and if it had, then under the statute it became a public highway.

has been declared to be public highway, and the public has been established the doctrine that once the public has been established a period of user for fifteen years is sufficient to establish a public highway. See Chicago vs. Council, 111 Ill. 411.

The instruction given by the court in behalf of the plaintiff advises the jury that to constitute this road a public highway it was necessary that it should be used as a road for a period of at least twenty years. That, it will be observed, is not in accordance with the statute, and none of the testimony introduced upon the trial of this case fixes the period during which the road had been used as a highway at time right to having been used, and the testimony of one of the witnesses, viz. Charles H. Jones, the most definite information with reference to the use of this highway, fixes it at sixteen years, and under this instruction the testimony together with that of other witnesses would be entirely ignored. The witness, Charles H. Jones, said he traveled over this road and known it for fifteen, probably twenty, years, and that during that time it was of the width of sixty feet. He also said, "We traveled it for the last forty years, over the identical place in dispute here". "I traveled over it with my produce; the width of it was sixty feet; it was used by the public for the full width. People would occasionally use different parts of it when the road was bad; it was a thirty foot road. It had been used for that width for the past sixteen or seventeen years. For fifteen years I have traveled over it myself. Other witnesses also testified to the use of this road for periods ranging from four to twenty years and this is not disputed by the evidence of the appellee but it seems to me practically conceded that the road had been traveled at least from fifteen to twenty years, and if it had been used for that time it became a public highway.

It further appears from the evidence that the appellant obstructed the road by building a fence for a distance of two hundred feet along about the center of the road and so forth with it. Under the evidence as presented by this record and in view of the opinion that the verdict of the jury was manifestly against the weight of the evidence and that the error was not harmless, retried. On the former trial of this case the court in its charge to the appellant gave instructions that we do not wish to call attention to, so, that they may be corrected in another trial. The court at the request of appellant instructed the jury, in substance, that if a road is used and traveled by the public as a highway and is recognized and kept in repair by the local highway commissioners, that proof of these facts creates a legal presumption liable to be rebutted that such road is a public highway. This theory seems to be supported by the case of Neely vs. Brown et al. 1st Gilman 10. A later decision of the Supreme Court, however, in the case of Grube v. Litchfield, 30 Conn. 92, seems to be in conflict with the former decision, and being the later utterance would necessarily prevail. It appears from this latter case that upon the trial it was recognized that if the road was used and worked and kept in repair by the public authorities that this would constitute it a highway. It is the opinion that this case was tried upon an incorrect theory, to the law covering the period for which a road must be shown to constitute it a public highway, and that the verdict of the jury was manifestly against the weight of the evidence.

It also assigned as error that the court gave judgment against the town for costs, which is all that was inadvertently done but this was error as the town is not liable for costs in prosecutions of this character. See *State v. Lacey*, 133 App., 408.

it further appears that the witness  
 observed the road by driving a vehicle for a  
 hundred feet along the center of the road and  
 it. Under the evidence as presented by this record  
 the opinion that the verdict of the jury was substantially  
 the weight of the evidence and that the same ought to be re-  
 tried. On the former trial of this case the court is advised  
 of the appellant gave instructions that have been reported as  
 attention to, so, that they may be corrected in future trials.  
 The court at the request of appellant instructed the jury, in  
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 a highway and is recognized and kept in repair by the  
 highway commissioners, that proof of these facts should be  
 local, responsibility liable to be rebutted that such road is a  
 its highway. This theory seems to be supported by the case of  
 Neely vs. Brown et al. (1st Circuit). A later decision of the  
 Supreme Court, however, in the case of *Prine v. State*, 1911,  
 92, seems to be in conflict with the former decision, and that  
 the later decision would necessarily prevail. It is of course true  
 this latter case that upon the trial it was recognized that  
 the road was used and worked and kept in repair by the  
 authorities that this would constitute it a highway. As the  
 the opinion that this case was tried upon an incorrect theory  
 to the law covering the period for which a road must be  
 constitute it a public highway, and that the verdict of the jury  
 was manifestly against the weight of the evidence.  
 It also appeared as error that the court instructed the jury  
 judgment against the law for costs, which is all correct,  
 inadvertently done but this was error as the court is not  
 for costs in prosecutions of this character. Two of the  
 last, 133 App. 103.

For the errors above indicated we are of the opinion  
that the judgment of the lower court should be reversed and  
the cause remanded for a new trial.

REVEREND JUSTICE OF THE PEACE.

\*\*\*\*\*

(Not to be reported in full).

For the errors above indicated, the error of the district  
that the judgment of the lower court should be reversed and  
the cause remanded for a new trial.

Reversed and remanded.

\*\*\*\*\*

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court  
at Mt. Vernon, this 28<sup>th</sup> day of July  
A. D. 1914

Clerk of the Appellate Court

# OPINION

*Fee \$*



# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff

And afterwards in Vacation, after said March term, to-wit: On the 27th day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

~~ERROR TO~~  
APPEAL FROM

188 I.A. 414

vs.

No. 30

City

COURT

March Term, 1914.

Edw. Lewis

COUNTY

TRIAL JUDGE

Hon. R. H. Flanagan



Term No. 30.

March Term, . . . 1914.

Royal M. Hamman, Administrator of  
the estate of Phillip Hamman, De-  
ceased,

vs.

Appellee,

Illinois Central Railroad Company,

Appellant.

Appeal from the  
City Court of  
East St. Louis.

18814111

McBride, J.

The plaintiff in the trial below obtained a judgment against the defendant which it seeks to reverse by this appeal. On the 29th of July, Phillip H. Hamman was killed by one of defendant's trains (at a highway crossing known as the Chartrand Crossing, on what is called the Falling Springs road or avenue, near the southwest limits of the city of East St. Louis. At this place the appellant's railroad consists of three tracks, extending nearly north and south, and are located about six feet apart. The east track is called the inbound track, the second outbound track and the third the yard track. A pair of scales is located upon the yard track and at the distance of about three hundred fifty feet south of the Chartrand Crossing. The Falling Springs Highway crosses these tracks at an angle of about thirty degrees, the highway extending nearly northeast and southwest. The tracks are elevated the distance of from four to six feet at the place where this highway crosses and the center of the highway at the place is graded in such a manner as to make an approach on to these tracks. On the day in question the deceased, Phillip Hamman and a Mr. Abbot had been engaged at work in a field near this crossing and it being the

March Term, A. D. 1914.

Appeal from the  
City Court of  
East St. Louis.

Royal M. Hamman, Administrator of  
the estate of Philip Hamman, Deceased,

Appellee,

vs.

Illinois Central Railroad Company,

Appellant.

11881

McBride, J.

The plaintiff in the trial below obtained a judgment against the defendant which it seeks to reverse by this appeal. On the 29th of July, Philip M. Hamman was killed by one of defendant's trains at a highway crossing known as the Orchard Crossing, on what is called the Falling Springs road or avenue, near the southwest limits of the city of East St. Louis. At this place the appellant's railroad consists of three tracks, extending nearly north and south, and are located about 100 feet apart. The east track is called the inbound track, the second outbound track and the third the yard track. A point of scales is located upon the yard track and at the distance of about three hundred fifty feet south of the Orchard Crossing. The Falling Springs Highway crosses these tracks at an angle of about thirty degrees, the highway extending nearly north and south. The tracks are elevated the distance of four to six feet at the place where this highway crosses the center of the highway at the place is graded in such a manner as to make an approach on to these tracks. On the day in question the deceased, Philip M. Hamman and a Mr. Abbot had been engaged at work in a field near this crossing and it had been

noon hour had ceased work and were preparing to eat their dinner and from some cause undertook to cross appellant's tracks. A short time before the deceased and abbot undertook to cross the tracks the appellant's servants passed along this yard track with an engine, going up to the scales for the purpose of weighing the cars. The engine was on the south end of the cars and after weighing them the engine pushed the four cars back to the north and towards Chartrand Crossing, the engine being in the rear with the cars in front, and was running at the rate of from four to six miles an hour. At this time another train was passing along the inbound track going in the same direction, towards the north, at the rate of about fifteen miles per hour and consisted of quite a number of cars, making a train of considerable length. Just before the engine with the four cars reached Chartrand Crossing the deceased and Abbot walked upon the yard track, apparently engaged in watching the train that was passing on the inbound track, and while they were upon the yard track the front car of the train upon that track struck them and killed them.

The declaration consists of three counts: the first one, after the formal part, charges "And while the said Philli Leman with all due care and caution was then walking across the said railroad at the said crossing upon the said public street, the defendant then and there by its said servants so carelessly and improperly drove and managed the said locomotive engine and train that by and through the negligence and improper conduct of the defendant, by its servants in that behalf, the said locomotive engine was then and there attached to said train of cars backed in front of said locomotive engine on one of its said several tracks and did not have any flagman at said crossing and

noon hour had ceased work and were preparing to quit the day's work and from some cause underwent to cross appellant's track. At a short time before the deceased and Abbott underwent to cross the tracks the appellant's servants passed along this yard track with an engine, going up to the scales for the purpose of weighing the cars. The engine was on the south end of the yard track after weighing them the engine pushed the four cars back north and towards Chatrand Crossing, the engine being in the rear with the cars in front, and was turning at the rate of four to six miles an hour. At this time another train was going along the inbound track going in the same direction, low the north, at the rate of about fifteen miles per hour and was stated of quite a number of cars, making a train of considerable length. Just before the engine with the four cars reached Chatrand Crossing the deceased and Abbott walked upon the yard track, apparently engaged in watching the train that was passing on the inbound track, and while they were upon the yard track the front car of the train upon that track struck them and killed them.

The declaration consists of three counts: the first, after the former part, charges "And while the said engine was then working across the said railroad at the said crossing upon the said public street, the defendant then and there by its said servants so carelessly and improperly drove and managed the said locomotive engine and train that by and through the negligence and improper conduct of the defendant, by its servants in that behalf, the said locomotive engine was then and there attached to said train of cars backed in front of said locomotive engine on one of the said several tracks and did not have any flagman or other person

nor any switchman, nor brakeman on the front car of said train. The said locomotive engine and train then and there ran and struck the said Phillip Hamman on and about his head and body with great force and violence, etc.

The second count charges defendant with having failed to ring the bell or blow the whistle upon approaching said crossing, as required by statute; in addition to the allegations contained in the first count.

The third count, after setting forth the facts substantially as alleged in the first count of the declaration, also alleges the existence of an ordinance in the city of East St. Louis, requiring that the bell on the locomotive shall be rung continuously while running within said city, and avers a failure to ring the bell as required by said ordinance. The defendant filed a plea of not guilty.

The cause was heard and a verdict for appellee for four thousand dollars, upon which the court rendered judgment. Several errors have been assigned by counsel for appellant but as we view the case, it will not be necessary to notice all of them. The first point argued by appellant is, that the negligence charged in the first count of the declaration is not that of carelessness and improper driving and managing the engine and train but it is that of pushing a train of cars over the crossing without a flagman at the crossing, and without having a switchman or brakeman on the front car of the train. And concludes by saying, that there is no law or ordinance requiring a flagman at this crossing or a switchman or brakeman to ride on the front end of the cut of cars traveling in broad daylight, and that the allegations are not sufficient to support a judgment.

We do not believe that this declaration is subject to the

not any switchman, nor brakeman on the front car of said train.  
 The said locomotive engine and train then and there ran on  
 struck the said Philip Haggan on and about his head and body  
 with great force and violence, etc.  
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 tained in the first count.  
 The third count, after setting forth the facts substantially  
 as alleged in the first count of the declaration, also alleges  
 as the existence of an ordinance in the city of East Attleboro,  
 requiring that the bell on the locomotive shall be rung contin-  
 uously while running within said city, and avers a failure to  
 ring the bell as required by said ordinance. The defendant  
 filed a plea of not guilty.  
 The cause was heard and a verdict for appellee for four  
 thousand dollars, upon which the court rendered judgment. The  
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 switchman or brakeman on the front car of the train. And ap-  
 pellant by saying, that there is no law or ordinance requiring  
 flagman at this crossing or a switchman or brakeman to ride  
 the front end of the cut of cars traveling in a road double-  
 track, that the allegations are not sufficient to support a verdict.  
 We do not believe that this declaration is subject to the



criticism offered. It seems to us that the fair interpretation of the declaration is, that the defendant, by its servants, improperly drove and managed the said locomotive engine and train, in this, that the said locomotive engine was then and there pushing said train of cars back in front of said locomotive engine, on one of its said switch tracks, and did not have any flagman at said crossing, nor any switchman nor brakeman on the front car of said train, and that all of these elements are united in the count as constituting negligence, which we are inclined to think, under the circumstances, would constitute negligence and would be sufficient to sustain a judgment, especially after a verdict.

It is also contended that the evidence does not show the appellant to have been guilty of negligence or that the appellee was in the exercise of due care for his own safety. It is true that the evidence as to the negligence, and especially as to the due care of the deceased at the time of the injury, is not very clear and convincing. While it appears that the deceased could by having looked have seen the train approaching and possibly avoided the danger, yet the circumstances of a train running upon the inbound track at the same time, which was probably attracting the attention of the travelers, and the further circumstance of their traveling at such an angle that their backs were nearly towards this approaching train and that it approached so noiselessly were all matters to be considered by the jury as circumstances from which the jury might excuse the party from looking or listening. The courts lay down the doctrine, "That a failure to look or listen, especially where it affirmatively appears that looking or listening might have enabled the party to



posed to injury to see the train and thus avoid being injured, is evidence tending to show negligence. But they are not conclusive evidence, so that a charge of negligence can be predicated upon them as a matter of law. There may be various mitigating circumstances excusing the party from looking or listening, and that being the case, a mere failure to look or listen cannot, as a legal conclusion, be pronounced negligence per se." *Chi. & N.W.R.R. Co. vs. Dunleavy*, 129 Ill., 132; *Winn vs. C. & S. L. R. R.*, 239 Ill., 132. So that as we read the decision of the Supreme Court, under such circumstances it is a question for the jury to determine whether or not the deceased was in the exercise of due care for his own safety. These, however, are matters upon which another jury must pass in this case, and we will omit any particular comment upon the evidence.

Appellant further contends that the giving of appellee's second instruction was reversible error. This instruction is, "If the jury believe from the evidence that the deceased was free from negligence on his part in attempting to cross the track, or railroad, that the defendant's servants in charge of the train were guilty of negligence, either in running over the crossing in question at a greater speed than was usual and then was reasonably safe to persons about to cross the track, or in not ringing the bell or sounding the whistle continuously for the distance of eighty rods before reaching the crossing, and that by reason of such negligence the deceased was injured, then the jury should find the issues for the plaintiff." It will be observed that this instruction directed a verdict and injects into the case the question of running over the crossing "At a greater speed than was usual and then was reasonably safe to

posed to injury to see the train and thus avoid being injured. It is evidence tending to show negligence. But they are not exclusive evidence, so that a charge of negligence can be made based upon them as a matter of law. There may be various other facts and circumstances excusing the party from looking or listening, and that being the case, a mere failure to look or listen cannot, as a legal conclusion, be pronounced negligence. *Chicago & N.W.R.R. Co. vs. Dunleavy*, 129 Ill. 132; *Wing v. C. & N.W.R.R.*, 239 Ill. 132. So that as we read the decision of the Supreme Court, under such circumstances it is a question for the jury to determine whether or not the deceased was in the exercise of due care for his own safety. There, however, are matters upon which another jury must pass in this case, and we will omit any particular comment upon the evidence. Appellant further contends that the giving of appellant's second instruction was reversible error. This instruction reads: "If the jury believe from the evidence that the deceased was free from negligence on his part in attempting to cross the track, or railroad, that the defendant's servants in charge of the train were guilty of negligence, either in running over the crossing in question at a greater speed than was usual and there was reasonably safe to persons about to cross the track, or in not ringing the bell or sounding the whistle continuously to the distance of eighty rods before reaching the crossing, and that by reason of such negligence the deceased was injured, then the jury should find the issues for the plaintiff." It will be observed that this instruction directed a verdict and injected into the case the question of running over the crossing at a greater speed than was usual and then was reasonably safe.

persons about to cross the track." "there is nothing in the declaration charging defendant with having operated its train at an excessive speed or at an unusual speed, and we are of the opinion that in the giving of the instruction the court should have confined appellee's right to recovery, to the charges set forth in his declaration, and that it was reversible error to embody in the instruction, elements of negligence not set forth in the declaration. Justice Wilkins in the case of Consolidated Coal Co. vs. Yung, 24 App., 258, says, "When the declaration alleges the personal negligence of the defendant as the ground of liability it is a fatal objection to instructions that they direct the attention of the jury to other and different elements of liability." C.C. & I. C. R. R. Co. vs. Troesch, 66 Ill., 547. "An instruction which allows a recovery for negligence in general respects without limitation to the particulars of negligence specified in the declaration, is too broad." C. & A. R. Co. vs. Mock, 72 Ill., 141; E. & W. R. Co. vs. People, 96 Ill., 584.

It further appears from this record that there is no evidence whatever upon which to base this instruction. We have been unable to find any evidence tending to show that this train was being run at an unusual rate of speed or that it was run at a greater rate of speed than was reasonably safe for persons about to cross the track. It was said by the Supreme Court that as "no evidence was offered to show that the servants of the defendant in charge of the train were incompetent, careless or unskillful, and in the absence of such evidence there was nothing on which to base the second instruction. It was <sup>not</sup> to be presumed because of the happening of the accident alone. It was

persons about to cross the track." There is nothing in the  
 declaration charging defendant with having operated the train  
 at an excessive speed or at an unusual speed, and we are of the  
 opinion that in the giving of the instruction the court has  
 have confined appellee's right to recovery, the the charge  
 forth in his declaration, and that it was reversible error to  
 embody in the instruction, elements of negligence not set forth  
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 they direct the attention of the jury to other and different  
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 111., 547. "An instruction which allows a recovery for negli-  
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 of negligence specified in the declaration, is too broad."  
 C. & A. R. Co. vs. Hook, 72 Ill., 141; N. & W. R. Co. vs.  
 People, 96 Ill., 384.

It further appears from this record that there is no evi-  
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 the defendant in charge of the train were incompetent, careless  
 or unskillful, and in the absence of such evidence there was  
 nothing on which to base the second instruction. It was to be  
 presumed because of the happening of the accident alone."

error to give the second instruction for the plaintiff." *M. & O. R. R. vs. Godfrey*, 155 Ill., 82. The jury could reasonably infer from this instruction an assumption of the existence of the facts as set forth therein, and for that reason, the court, in the case of *Mieman vs. Schnitker*, 181 Ill., 406, condemns it and says "The fact that the court assumes to state the law applicable to particular states of case is of itself an assumption that those states of case exist, for it is not to be presumed a court would give the law to the jury while trying a case, with reference to questions not believed to be before them." And the court there held that the giving of such instruction was erroneous and the case was reversed.

Owing to the character of the acts of negligence and due care proven in this case, we are of the opinion that it is highly important that the jury should have been correctly instructed, and we believe that the instruction referred to was of a character calculated to mislead the jury and permit them to assume as elements of negligence matters that were not in the case, and that the giving of the instruction under such circumstances was reversible error, and the judgment of the lower court is reversed and the cause remanded.

REV-ERSED AND REM-ANDED.

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(Not to be reported in full.)

error to give the second instruction for the first time. O. R. N. vs. Godfrey, 155 Ill., 82. The jury could reasonably infer from this instruction an assumption of the existence of the facts set forth therein, and for that reason, the court in the case of Nieman vs. Schmitzer, 181 Ill., 406, considered it and says "The fact that the court assumes to state the law applicable to particular states of case is of itself no assumption that those states of case exist, for it is not to be presumed a court would give the law to the jury while the case, with reference to questions not believed to be before them." And the court there held that the giving of such an instruction was erroneous and the case was reversed.

Owing to the character of the acts of negligence and of case proven in this case, we are of the opinion that it is highly important that the jury should have been correctly instructed, and we believe that the instruction referred to was of a character calculated to mislead the jury and to prevent it to assume an element of negligence matters that were not in the case, and that the giving of the instruction under such circumstances was reversible error, and the judgment of the lower court is reversed and the cause remanded.

INVESTIGATION AND REPORT

(Not to be reported in full.)



*I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.*

*IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court  
at Mt. Vernon, this 28<sup>th</sup> ——— day of July,  
A. D. 1911.*

*Clerk of the Appellate Court*

# OPINION

*Fee's*

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1320

27-2-14

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

- Hon. Harry Higbee, Presiding Justice.
- Hon. James C. McBride, Justice.
- Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff

And afterwards in Vacation, after said March term, to-wit: On the 26th day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Malkins

ERROR TO  
APPEAL FROM

1831 A. 416

No. 36

vs.

Circuit COURT

March Term, 1914.

Madison COUNTY

Madison Coal  
Corporation

TRIAL JUDGE

Hon. Geo. A. Brown



Term No. 36.

Agenda No. 41.

March Term, A. D. 1914.

Gerret Wilkins,

Appellee,

vs.

Madison Coal Corporation,

Appellant.

Appeal from the  
Circuit Court of  
Madison County.

McBride, J.

1914 416

A jury was waived and trial had before the Judge by consent of the parties, which resulted in a judgment for the plaintiff for \$2,999.00, to reverse which the defendant prosecuted this appeal.

At the time of the injury complained of appellee was engaged in running a machine used in under-cutting coal in one of appellant's mines. He, with his buddy, was operating a machine in a cross-cut that was being opened up off from room No. 1, towards room No. 2, off of the 14th North entry on the main east entry. The fall and injury occurred Wednesday, November 1, 1911, at some time after eleven o'clock. The mine had not been in operation on the day before but on Monday before appellee and his buddy were engaged in undercutting this cross-cut and had cut two boards, beginning at the left, but had to quit on account of there being some down coal at the right of the cross-cut which had to be cleaned up before they could complete the cut. At about three o'clock on Wednesday morning, November 1st, the mine examiner examined this cross-cut, and carried with him in the making of the examination, as he ~~certifies~~<sup>testifies</sup>, an iron rod about two and one-half feet long and half inch in diameter with a knob on the end about one inch in diameter; and also carried a safety lamp and an anemometer. He testified that he

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examined the roof of this cross-cut, thoroughly sounding the roof from one side to the other and found the roof solid. He made his visitation mark 1/11/11 and reported the cross-cut safe. At about eight o'clock in the morning of the same day the loader who had been engaged in cleaning up the coal in this room came into the room for the purpose of examining it, expecting to shoot and load out the coal as soon as the under-cutting was completed. At this time they both testified they sounded the roof carefully and found it solid and no loose or dangerous coal, and proceeded to complete the loading of the down coal that had been left at the right hand side of the room. After they had finished loading this coal appellee and his buddy, at about ten o'clock in the morning, came into the cross-cut to complete the under-cutting. They testified that shortly after they commenced work they discovered some loose or hanging coal at about eight feet from the face and near a cross bar. That they notified the loaders to set a prop under this loose coal, which they did, and after the prop was set the roof was again sounded and ascertained to be solid. Thereupon the appellee and his buddy proceeded to operate their machine and after it had been at work for about fifteen minutes another part of the roof, a part that had been solid heretofore, became detached and fell upon appellee and injured him. The portion that fell was not that which had been propped but was a part of that which had been sounded and found to be solid.

There are two counts in the declaration. The first charges, that on said date and prior thereto there existed in the roof of said cross-cut and over the working place therein, a lot of slate, dirt, rock and other material that was insecure and dangerous and likely to come down at any time and injure those at work in under-

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cutting and loading coal therein, of which the defendant then and there well knew, and that the defendant wilfully failed and omitted to inspect said roof at said point and to observe said dangerous roof thereat.

The second count charges that there existed in the roof of said cross-cut and over the working place therein a lot of loose, cracked and dangerous slate, dirt, rock and other material which was likely to come down at any time and injure servants of the defendant engaged in working in said cross-cut, of which the defendant then and there well knew. That the mine examiner within twelve hours inspected the place and observed said dangerous roof at said point, and wilfully failed and omitted to place a conspicuous mark or sign thereat as notice to all men to keep out, and wilfully failed to make a daily record of the conditions as required by statute.

Several errors have been assigned and argued by counsel for appellant but as we view this case there is but one question that is necessary to be considered and that is, Was the cross-cut in question in a dangerous condition at the time the mine examiner examined it, and if so, did he mark it as dangerous? There is no dispute as to the fact that the roof or cross-cut was not marked as dangerous. It is, however, contended by counsel for appellant that the reason it was not so marked was because it was not dangerous at that time and did not require to be marked as such, and this is the real question that is presented and argued by counsel for appellant and appellee. At the time that the mine examiner passed through the cross-cut, examined it and sounded the roof, he says that he sounded it thoroughly and found the roof solid and found no loose conditions existing in the roof. The next persons that

cutting and loading coal therein, of which the defendant was aware and there well knew, and that the defendant willfully failed and omitted to inspect said roof at said point and to observe and report dangerous roof threat.

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said cross-cut and over the working place therein a lot of loose, stacked and dangerous slate, dirt, rock and other material which was likely to come down at any time and injure persons of the defendant engaged in working in said cross-cut, of which the defendant then and there well knew. That the mine examiner within twelve hours inspected the place and observed said dangerous roof at said point, and willfully failed and omitted to place a conspicuous mark or sign thereat as not to allow men to keep out, and willfully failed to make a daily record of the conditions required by statute.

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were in this ~~xxx~~ cross-cut were Louis Arnaldi and Fred Dryer, who went into that cross-cut at about eight o'clock in the morning, and as they were expecting to shoot and load the coal that was being <sup>then</sup> under-cut both testified they sounded the roof of this cross-cut from side to side and found it solid, and found no loose coal of any character in the roof at that time. The next parties that came into the cross-cut were appellee and his buddy who came in at about ten o'clock in the morning for the purpose of completing the board that they had commenced to cut. That shortly after they began work they discovered some loose or hanging coal, near the first cross-bar, from the face and called upon the loaders to set a prop under this hanging coal, which they did, and after the prop had been set under the coal the roof was again sounded and it was then determined that it was sound and no loose coal. Appellee and his buddy had been engaged at work operating the machine but a short time when some of the coal near the face that had sounded solid but a few minutes before <sup>he</sup> came loose, fell upon appellee and injured him.

The declaration alleges that this dangerous condition existed at the time the mine examiner was in the room and examined it, and the burden was upon the plaintiff to show such conditions. Cook vs. Big Buddy Coal & Mining Co., 249 Ill., 41; Odorizzi vs. Southern Coal & Mining Co., 151 App., 393. We do not believe that the evidence in this record sustains the allegation but are of the opinion that the weight of the evidence shows that at the time the mine examiner visited this cross-cut the condition complained of did not then exist. We think it affirmatively appears, not only that the roof was solid at that

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The declaration alleges that this dangerous condition existed at the time the mine examiner was in the room and examined it, and the burden was upon the plaintiff to show such conditions. Cook vs. Big Muddy Coal & Mining Co., 240 Ill. 411; Obozinski vs. Southern Coal & Mining Co., 151 App. 365. We do not believe that the evidence in this record sustains the allegation but one of the opinion that the weight of the evidence shows that at the time the mine examiner visited this cross-cut the condition complained of did not then exist. We think it affirmatively appears, not only that the roof was solid at the

time but in the morning at eight o'clock two disinterested witnesses testified that the roof was then solid and no indications of loose coal existing. It is contended by counsel for appellee that a dangerous condition did in fact exist, and the mere fact that the examiner did not ascertain it would not excuse appellant from liability. This is probably true as a legal proposition, if such physical facts were disclosed as ought to have caused the mine examiner to see the danger and that in passing upon the dangerous condition his judgment was at fault and failed to appreciate the danger that the physical facts indicated. We do not understand that if there are no physical<sup>facts</sup>/indicating a dangerous or unsafe condition that the appellant can be made liable simply because it afterwards turned out that a latent danger not discoverable really existed and an injury resulted therefrom. Much reliance is placed by counsel for appellee, in support of this position, upon the case of Piazzi vs. Kerens-Donnewald Coal Co., 262 Ill., 33 (Advance Sheets), which was decided by this court and affirmed by the Supreme Court, which sustains the doctrine that although the mine examiner may have examined the place and in good faith believed that the conditions were not dangerous, yet the appellant would be liable. There is, however, a marked difference between that case and the present one. In that case there was a clod that hung from the roof of the cross-cut, which the mine examiner could see, and did see, but he did not seem to appreciate that it was dangerous; but in the present case, the evidence shows that so far as the physical facts that were visible or could be ascertained, by the means required by statute, there was nothing to indicate a dangerous condition, and we must conclude that the dangerous condi-

time but in the morning at eight o'clock two distinguished witnesses testified that the roof was then solid and no indications of loose coal existing. It is contended by counsel for appellee that dangerous condition did in fact exist, and the mere fact that the examiner did not ascertain it would not excuse appellant from liability. This is probably true as a legal proposition, if such physical facts were disclosed or ought to have caused the mine examiner to see the danger and that in passing upon the dangerous condition his judgment was at fault and failed to appreciate the danger that the physical facts dictated. We do not understand that if there are no physical facts dictating a dangerous or unsafe condition that the appellant can be made liable simply because it afterwards turned out that a latent danger not discoverable really existed and an injury resulted therefrom. Much reliance is placed by counsel for appellee, in support of this position, upon the case of *Linnell vs. Kereans-Donnell Coal Co.*, 262 Ill., 33 (Advance Sheets), which was decided by this court and affirmed by the Supreme Court, which sustains the doctrine that although the mine examiner may have examined the place and in good faith believed that the conditions were not dangerous, yet the appellant would be liable. There is, however, a marked difference between that case and the present one. In that case there was a cloud that hung from the roof of the cross-cut, which the mine examiner could see, but he did not seem to appreciate that it was dangerous; but in the present case, the evidence shows that so far as the physical facts that were visible or could be ascertained, no means required by statute, there was nothing to indicate a dangerous condition, and we must conclude that the dangerous

tion arose even after the room had been examined by the loaders in the morning.

It is further contended that the question as to whether or not a dangerous condition existed was for the trial court to determine. This, as a legal proposition is true, if there is evidence in the record to support it, but, as we have above stated, we do not find any evidence in this record to sustain that position.

It is also said that one of the witnesses discovered a slip in the roof after this prop had been set, but it is further shown by the testimony that this slip was not discernable at the former examinations, and that it frequently happens that you could not discover a slip until some of the coal had fallen.

We think the principles laid down by this court in the case of Vyskocil vs. Edwardsville Home Trade Coal Co., decided at the October Term (not yet reported) are controlling in this case, and that the appellee failed to show that the dangerous condition complained of existed in the roof of this cross-cut at the time the mine examiner visited the room, and this being true he was not required, under the law, to mark it in any manner, except to place on the wall thereof his visiting mark, which he did.

Viewing the evidence in this case as we do we are of the opinion that the findings of the court are manifestly against the weight of the evidence, and the judgment of the lower court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

(Not to be reported in full.)

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We think the principles laid down by this court in the case of *Vyskocil vs. Edwardsville Home Trade Coal Co.*, decided at the October Term (not yet reported) are controlling in this case, and that the appellee failed to show that the dangerous condition complained of existed in the roof at this cross-examination. At the time the mine examiner visited the room, and this being time he was not required, under the law, to mark it in any manner, except to place on the walls thereof his visiting mark, which he did.

Viewing the evidence in this case as we do we are of the opinion that the findings of the court are manifestly against the weight of the evidence, and the judgment of the lower court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

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(Not to be reported in full.)



I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court  
at Mt. Vernon, this 28th day of July,  
A. D. 1914

Clerk of the Appellate Court.

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# OPINION

*Fees*

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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSAUGH, Clerk.

W. S. PAYNE, Sheriff

And afterwards in Vacation, after said March term, to-wit: On the 26<sup>th</sup> day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

138 I.A. 418

The People, vs.  
Dunn.

~~FROM TO~~  
APPEAL FROM

vs.

County

COURT

No.

37

March Term, 1914.

Johnson

COUNTY

Moore

TRIAL JUDGE

Hon.

J. F. Hight



March Term A.D. 1914.

The People of the State of Illinois,  
for the use of Betty Dunn.

152 61790,

714.

ROY MOORE,

[illegible]

1881

40 miles N.

This is a suit prosecuted by the State of Tennessee, Moore charging him with being the father of a bastard child that was born to her on January 19, 1913. The child, it is said, said child was begotten by the appellant on the night of April 13, 1912, and the complaint was filed in the court as far as preserved by the record the usual complaint in such cases exists. The evidence of Betty Lunn and her witnesses tend to show that the appellant had sexual intercourse with the father of the child, when in service of him at that time, and some evidence offered tending to show, that at this time other parties had sexual intercourse with her. The trial resulted in a verdict, finding the appellant to be the father of the child and judgment was entered in the court requiring the defendant to pay \$750.00 for his support. On this judgment the appellant prosecutes his appeal, claiming four errors which will be noticed out not in the order of

In the fourth error appellant complains of the action of the court in refusing to set aside the verdict and grant a new trial, claiming that the verdict is manifestly unjust and

which are...

The people of the State of Illinois,  
for the use of the State of Illinois.

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1881

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evidence.

There is not any certificate of the Judge that the record here presented contains all of the evidence offered on the trial. It is true that the reporter says the foregoing is all of the evidence and signed it, but this is not sufficient, for the making of such a record is a judicial act and must be performed by the Judge. Such authority cannot be delegated to the reporter and cannot be delegated to the parties to make a bill of exceptions by agreement. *Hallers vs. Whittier Machine Co.*, 120 Ill. 311, 11 Ill. App. 223. *Pointon vs. St. Louis A. & T.H.R.Co.*, 90 Ill. App. 623.

The law is well settled that where such a certificate of the Judge, is not incorporated in the bill of exceptions, the Appellate court must presume that the jury and the court were warranted in finding the verdict and judgment reasonable and we can not interfere with such verdict on or after the Judge before whom the case was tried does not state that the bill of exceptions contains all of the evidence, and the certificate of the reporter cannot be taken as a substitute for a certificate by the Judge. *Cogshall vs. Seeley*, 76 Ill. 311. *Young vs. City of Fairfield* 173 Ill. 311. The presumption of law is that the evidence was sufficient to support the verdict of the jury and the judgment of the court, and said verdict can not be reviewed for the purpose of determining its sufficiency.

Complaint is also made, by counsel for Appellant, of the ruling of the trial court in permitting the prosecuting attorney to exhibit and display such bastard child to the jury in the manner she did. The evidence shows that the mother of the child had the child in court, and that at the time the child was near the jury with the child, to which counsel for Appellant objected and the court immediately refused to allow the same.





with the child to the other part of the room. ... no effort, as shown by this testimony to ... this child to the jury, or to give the jury an opportunity to examine the child critically, and the action of the court in the rule which prohibits the exhibit of the child is for the purpose of letting them determine from their own observation whether or not it resembles the defendant. ... reference to the presence of this child, from this record, ... that the child was in the court room with the mother; ... understand the law it is not error to have the child present in the court room. *Benes vs. People, etc.*, 161, p. 107.

It is next complained that the court refused to permit the prosecuting witness to answer questions propounded during cross-examination with reference to whether or not April 1907 was the first time that she had ever had sexual intercourse, and that if she had not stated on other occasions that this was the first man with whom she had ever had any improper relationship, to have examined these questions carefully, some of them were improper, and the objections were well sustained by the court. Others of them did not, as we understand this evidence, ... thing more than to show on former occasions she had endeavored to be a virtuous woman. We do not think this was a material question as it could make no difference whether she was virtuous or not, if the defendant was the father of the child. The court is bound in law to support it, and the sole question before the jury was as to the paternity of the child. We are not going to say that the court committed any error in sustaining the objections to this cross examination.

It is next complained that the court erred in the instructions for the plaintiff. Instruction No. 1 is ... because it tells the jury that in determining the weight of evidence and the credit to be given to the testimony of several witnesses, they may apply the following rule: ...

the court room. Jones vs. Hoole, etc., 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41st, 42nd, 43rd, 44th, 45th, 46th, 47th, 48th, 49th, 50th, 51st, 52nd, 53rd, 54th, 55th, 56th, 57th, 58th, 59th, 60th, 61st, 62nd, 63rd, 64th, 65th, 66th, 67th, 68th, 69th, 70th, 71st, 72nd, 73rd, 74th, 75th, 76th, 77th, 78th, 79th, 80th, 81st, 82nd, 83rd, 84th, 85th, 86th, 87th, 88th, 89th, 90th, 91st, 92nd, 93rd, 94th, 95th, 96th, 97th, 98th, 99th, 100th, 101st, 102nd, 103rd, 104th, 105th, 106th, 107th, 108th, 109th, 110th, 111th, 112th, 113th, 114th, 115th, 116th, 117th, 118th, 119th, 120th, 121st, 122nd, 123rd, 124th, 125th, 126th, 127th, 128th, 129th, 130th, 131st, 132nd, 133rd, 134th, 135th, 136th, 137th, 138th, 139th, 140th, 141st, 142nd, 143rd, 144th, 145th, 146th, 147th, 148th, 149th, 150th, 151st, 152nd, 153rd, 154th, 155th, 156th, 157th, 158th, 159th, 160th, 161st, 162nd, 163rd, 164th, 165th, 166th, 167th, 168th, 169th, 170th, 171st, 172nd, 173rd, 174th, 175th, 176th, 177th, 178th, 179th, 180th, 181st, 182nd, 183rd, 184th, 185th, 186th, 187th, 188th, 189th, 190th, 191st, 192nd, 193rd, 194th, 195th, 196th, 197th, 198th, 199th, 200th, 201st, 202nd, 203rd, 204th, 205th, 206th, 207th, 208th, 209th, 210th, 211st, 212nd, 213th, 214th, 215th, 216th, 217th, 218th, 219th, 220th, 221st, 222nd, 223rd, 224th, 225th, 226th, 227th, 228th, 229th, 230th, 231st, 232nd, 233rd, 234th, 235th, 236th, 237th, 238th, 239th, 240th, 241st, 242nd, 243rd, 244th, 245th, 246th, 247th, 248th, 249th, 250th, 251st, 252nd, 253rd, 254th, 255th, 256th, 257th, 258th, 259th, 260th, 261st, 262nd, 263rd, 264th, 265th, 266th, 267th, 268th, 269th, 270th, 271st, 272nd, 273rd, 274th, 275th, 276th, 277th, 278th, 279th, 280th, 281st, 282nd, 283rd, 284th, 285th, 286th, 287th, 288th, 289th, 290th, 291st, 292nd, 293rd, 294th, 295th, 296th, 297th, 298th, 299th, 300th, 301st, 302nd, 303rd, 304th, 305th, 306th, 307th, 308th, 309th, 310th, 311st, 312nd, 313th, 314th, 315th, 316th, 317th, 318th, 319th, 320th, 321st, 322nd, 323rd, 324th, 325th, 326th, 327th, 328th, 329th, 330th, 331st, 332nd, 333rd, 334th, 335th, 336th, 337th, 338th, 339th, 340th, 341st, 342nd, 343rd, 344th, 345th, 346th, 347th, 348th, 349th, 350th, 351st, 352nd, 353rd, 354th, 355th, 356th, 357th, 358th, 359th, 360th, 361st, 362nd, 363rd, 364th, 365th, 366th, 367th, 368th, 369th, 370th, 371st, 372nd, 373rd, 374th, 375th, 376th, 377th, 378th, 379th, 380th, 381st, 382nd, 383rd, 384th, 385th, 386th, 387th, 388th, 389th, 390th, 391st, 392nd, 393rd, 394th, 395th, 396th, 397th, 398th, 399th, 400th, 401st, 402nd, 403rd, 404th, 405th, 406th, 407th, 408th, 409th, 410th, 411st, 412nd, 413th, 414th, 415th, 416th, 417th, 418th, 419th, 420th, 421st, 422nd, 423rd, 424th, 425th, 426th, 427th, 428th, 429th, 430th, 431st, 432nd, 433rd, 434th, 435th, 436th, 437th, 438th, 439th, 440th, 441st, 442nd, 443rd, 444th, 445th, 446th, 447th, 448th, 449th, 450th, 451st, 452nd, 453rd, 454th, 455th, 456th, 457th, 458th, 459th, 460th, 461st, 462nd, 463rd, 464th, 465th, 466th, 467th, 468th, 469th, 470th, 471st, 472nd, 473rd, 474th, 475th, 476th, 477th, 478th, 479th, 480th, 481st, 482nd, 483rd, 484th, 485th, 486th, 487th, 488th, 489th, 490th, 491st, 492nd, 493rd, 494th, 495th, 496th, 497th, 498th, 499th, 500th, 501st, 502nd, 503rd, 504th, 505th, 506th, 507th, 508th, 509th, 510th, 511st, 512nd, 513th, 514th, 515th, 516th, 517th, 518th, 519th, 520th, 521st, 522nd, 523rd, 524th, 525th, 526th, 527th, 528th, 529th, 530th, 531st, 532nd, 533rd, 534th, 535th, 536th, 537th, 538th, 539th, 540th, 541st, 542nd, 543rd, 544th, 545th, 546th, 547th, 548th, 549th, 550th, 551st, 552nd, 553rd, 554th, 555th, 556th, 557th, 558th, 559th, 560th, 561st, 562nd, 563rd, 564th, 565th, 566th, 567th, 568th, 569th, 570th, 571st, 572nd, 573rd, 574th, 575th, 576th, 577th, 578th, 579th, 580th, 581st, 582nd, 583rd, 584th, 585th, 586th, 587th, 588th, 589th, 590th, 591st, 592nd, 593rd, 594th, 595th, 596th, 597th, 598th, 599th, 600th, 601st, 602nd, 603rd, 604th, 605th, 606th, 607th, 608th, 609th, 610th, 611st, 612nd, 613th, 614th, 615th, 616th, 617th, 618th, 619th, 620th, 621st, 622nd, 623rd, 624th, 625th, 626th, 627th, 628th, 629th, 630th, 631st, 632nd, 633rd, 634th, 635th, 636th, 637th, 638th, 639th, 640th, 641st, 642nd, 643rd, 644th, 645th, 646th, 647th, 648th, 649th, 650th, 651st, 652nd, 653rd, 654th, 655th, 656th, 657th, 658th, 659th, 660th, 661st, 662nd, 663rd, 664th, 665th, 666th, 667th, 668th, 669th, 670th, 671st, 672nd, 673rd, 674th, 675th, 676th, 677th, 678th, 679th, 680th, 681st, 682nd, 683rd, 684th, 685th, 686th, 687th, 688th, 689th, 690th, 691st, 692nd, 693rd, 694th, 695th, 696th, 697th, 698th, 6

It is next complained that the court refused to allow the prosecuting witness to answer questions propounded by the cross-examination with reference to whether or not Agent was the first time that she had ever had sexual intercourse with him and that if she had not stated on other occasions that this was the first man with whom she had ever had any improper relationship. The court have examined these questions carefully, some of them were improper, and the objections were well sustained by the court. Others of them did not, as we understand this evidence, and things were then to show on former occasions she had intercourse with a virtuous woman. We do not think this was a material question as it could make no difference whether she was a virgin or not, if the defendant was the father of the child. It is bound in law to support it, and the sole question of the jury was as to the paternity of the child. We are confident that the court committed any error in sustaining the objections to this cross examination.

It is next contended that the Court erred in its instructions for the plaintiff. Instruction one is correct because it tells the jury that in determining the evidence and the weight to be given to the evidence, several witnesses, that is, applying the law to the facts.

to all the facts and circumstances proven in the case. I think the criticism is without merit. The jury are to be told and it was their duty, to apply whatever experience and knowledge they may have had in determining the facts in the case.

It is claimed that instruction No. 2 is erroneous in having told the jury that they are not 'bound' to believe a witness merely because a witness has testified to it and "should not do so" if from all the facts and circumstances proven the witness is mistaken or testified falsely. The objection is that the jury are liable to think that they are not to believe other evidence. The giving of this instruction is not erroneous.

Instructions four and five are criticised because they tell the jury that they are not bound to take the testimony of a witness as absolutely true and they should not do so if they are satisfied from all the facts and circumstances proven at trial that the witness is mistaken, or testified falsely. I cannot see any objection to this instruction, besides that one given on behalf of defendant implies the same thing and the criticism is not well taken.

Instruction eight is criticised because it tells the jury that even if the prosecuting witness had intercourse with other persons such fact would not warrant the jury in finding the defendant not guilty, if they believe from a preponderance of the evidence that the defendant is the father of such child. This, we understand, to be the law and the criticism is without merit.

Instruction three which reads as follows; "You are to determine the credibility of the witnesses is a question to be decided by the jury; and the law is that where two witnesses testify directly opposite to each other the jury are to determine

[illegible]

to consider the weight of the evidence as a whole, and the jury have the right to determine from the appearance of witness<sup>x</sup> on the stand, their manner of testifying, and candor and fairness and from all the other surrounding circumstances appearing on the trial which witnesses are most worthy of credit and give credit accordingly. They are inclined to agree with counsel that this instruction, standing alone is subject to criticism. It is true that a similar instruction, was criticised by Justice, in the case of Ryan vs. the People, 124 App. 403, regarding the expression "All the evidence in the case, but he gave the opinion rendered," Under the state of the evidence in the record, considering the degree of proof required in a criminal case, it was highly important that the instruction given to the jury should be substantially correct in substance of the law, and in form, without apparent bias or misdirection or suggestion". It will be observed that this instruction directed a verdict.

Instructions one, three and eight, given on behalf of the defendant, and one and four given on behalf of the plaintiff expressly advise the jury that in determining the issue in the case they must take into consideration all of the evidence and circumstances proven on the trial. In the case of ~~179~~ Balswic, 179 App. 116, where a criticism of a similar instruction was made, the court said, "The first criticism by appellant is that it did not confine the jury to the consideration of the facts and circumstances in evidence, but led them to go outside the evidence to find facts and circumstances. While not technically accurate we cannot say that this criticism was harmful to appellant. While the criticism was

to consider the weight of the evidence as given by the jury have the right to determine from the testimony of the witnesses on the stand, their manner of testifying, the candor and fairness and from all the other surrounding circumstances appearing on the trial which witness or witnesses are most worthy of credit and give credit accordingly. It is inclined to agree with counsel that this instruction is alone is subject to criticism. It is true that an instruction similar to this one, was criticized by Justice, in the case of Ryan vs. The People, 124 App. 403, because the expression "All the evidence in the case, but the opinion rendered," under the state of the evidence, the record, considering the degree of proof required to convict in a criminal case, it was highly important that the instruction given to the jury should be unambiguously correct in its statement of the law, and in form, without apparent error or misleading suggestion". It will be observed that this instruction is direct a verdict.

Instructions one, three and eight, given on behalf of the defendant, and one and four given on behalf of the plaintiff, expressly advise the jury that in determining the issues in the case they must take into consideration all of the evidence, and circumstances proven on the trial. In the case of the defendant, People v. Belawick, 179 App. 118, where a criticism of a similar instruction was made, the court said, "The court instructed by appellant is that it did not confuse the jury as to the admission of the facts and circumstances in evidence, and then to go outside the evidence to the question of guilt while not technically accurate we cannot see how it could be harmful to appellant. While the instruction is

this case was not specifically argued in the 186 Ill. cases, yet in Chicago & N.W.R.Co. vs. Mins, 186 Ill. 186 Ill., 9, an instruction similar in phraseology is to be good. Even if it be conceded that this instruction is erroneous this court would not be justified in reversing the verdict for such an error because appellant fell into a similar or worse error in some of his given instructions, in which the words, "under all the circumstances" or "if the facts and circumstances" were used, and is therefore in no situation to complain". While we believe that the instruction is open to criticism, yet we are not able to say that the jury was misled in any manner by the instruction, or that a different result would have been reached if the instruction had been strictly accurate. When all of the instructions are considered we are satisfied that the court was liberal in its instructions in favor of the defendant. This is not a criminal case, as was the one referred to by Justice Myers in Ryan vs. People, supra, but is only a civil proceeding and brought to enforce payment of a sum of money for the support of the child. We are not able to say that the court committed reversible error in giving of this instruction.

It is next contended that the judgment rendered is not in conformity with the statute and is erroneous in requiring to bind sureties to pay whatever judgment might be rendered against the defendant for the support and maintenance of the bastard child, before and in advance of the judgment being rendered, just upon their oral appearance in court. We have examined the record in this case and find that the criticism is well taken as the judgment is rendered against the defendant only, and not against the sureties, as contended.

this case was not specifically argued in its favor, but it is  
eases, yet in Chicago v. I. A. Co. and Kansas, 100 Ill. 211, 1881,  
and in the Supreme Court in its later decisions, and in the  
188 Ill. 9, an instruction similar to the one given in this  
be good. Even if it be conceded that this instruction is  
some this court would not be justified in reversing the  
for such an error because appellant "fell into a trap."  
where error in some of the given instructions, the trial  
words, "under all the circumstances" or "in the light of  
circumstances" were used, and is therefore in no way  
complain". While we believe that the instruction is not  
criticism, yet we are not able to say that the error is  
in any manner of the instruction, or that a different  
would have been reached if the instruction had been  
accurate. When all of the instructions are considered  
settled that the court was liberal in the instructions  
on behalf of the defendant. This is not a technical error,  
was the one referred to by Justice Stone in 1934, and  
supra, but as only a civil proceeding and brought to  
payment of a sum of money for the benefit of the child,  
not able to say that the court committed reversible error  
giving of this instruction.

It is next contended that the judgment rendered by the court  
is not in conformity with the statute and is erroneous in  
ing to bind suitors to pay whatever judgment might be rendered  
against the defendant for the support and maintenance of the  
bastard child, before and in advance of the judgment being  
ed, just upon their own appearance in court. It is contended  
ed the record in this case and that the instruction was  
well taken as the judgment rendered against the defendant  
only, and not against the child.



their appearance and agreement made in open court, prior to the rendition of judgment that the bondman shall stand for the payment of the judgment appears in the record, and that it is not in any manner incorporated in the judgment, and hence, after all, be only an agreement to be enforced in a proper manner. His objection is not well taken.

There being no certificate of the trial Judge that all the evidence introduced on the trial was preserved in the record, that law requires us to presume that the evidence was sufficient to warrant a verdict and judgment in this case. When it is determined that the evidence is sufficient to warrant a verdict, we cannot see that there is any such error in the rulings of the court upon the evidence, or the giving of the instructions, as would warrant a reversal. If the defendant is the father of the child, as the jury and trial Judge have found, then it is his duty to help support the child and he ought not to be allowed to escape from such support through a mere technicality in the instructions, or exclusion of evidence, unless it is made to clearly appear that he was prejudiced in his rights by such rulings of the court. Nothing of the kind appears in this case. We are satisfied with the verdict of the jury and the judgment of the court, and the judgment is affirmed.

Judgment affirmed.

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( Not to be reported in full )

their exchange and agreement in a...  
the rendition of judgment that the...  
the payment of the judgment...  
not in any manner incorporated in the judgment...  
will be only an agreement to be entered in...  
objection is not well taken.

There being no objection to the...  
the evidence introduced at the trial was...  
the law requires me to presume that the...  
to warrant a verdict and judgment in this...  
mixed that the evidence is sufficient to...  
cannot see that there is any such error in the...  
court upon the evidence, or the...  
we would warrant a verdict. If the defendant...  
child, as the jury and trial judge have found, that...  
duty to help support the child and he ought not to...  
to escape from such support through a mere...  
instructions, or exclusion of evidence, unless it...  
clearly appear that he was prejudiced in this...  
rulings of the court. Nothing of the kind...  
are satisfied with the verdict of the jury and...  
of the court, and the judgment is affirmed.

WITNESSES:

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(Not to be repeated in trial)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court  
at Mt. Vernon, this 28th day of July,  
A. D. 1914.

A. C. Millspaugh  
Clerk of the Appellate Court

# OPINION

*Fee \$*

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# Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff

And afterwards in Vacation, after said March term, to-wit: On the 25<sup>th</sup> day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

~~ERROR TO~~  
APPEAL FROM

Dallas

188 I.A. 420

Circuit

COURT

vs.

No.

38

March Term, 1914.

Madison COUNTY

E. St. Louis & sub.  
Ry. Co.

TRIAL JUDGE

Hon.

W. E. H. H. H.



Term No. 36.

March Term A.D. 1914.

March Term A.D. 1914.

Iva Dallas,

Appellee,

vs.

East St. Louis & Suburban  
Railway Company,

Appellant.

Appeal from the Circuit Court  
of Madison County, Illinois.

18814 420

Mc Bride J.

Upon a trial of this case the plaintiff obtained a judgment in the court below for three thousand dollars, which the defendant seeks to reverse by this appeal. The declaration which consisted of one count alleges that on October 16, 1911, appellant was possessed of and operating an electric railroad in the city of Collinsville, Madison County, Illinois. That appellee was a passenger on appellant's car for coach, and was carried from Hesperie street to Lysander street in Collinsville. That it was the duty of the defendant to stop said car at the corner of Main and Lysander streets in said city, a reasonable time to allow plaintiff to alight therefrom; that defendant, regarding its duty in that behalf, and when said car arrived at plaintiff's destination, and while plaintiff with all due care and caution was upon the rear platform of said car for the purpose of alighting therefrom, contrary to the duty by its servants caused the speed of the car to be increased almost stopped and then without warning to the plaintiff before said car had wholly stopped, and before plaintiff had allowed opportunity to alight from the car, suddenly and violently caused said car to be jerked, and the plaintiff

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Iva...

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plaintiff with great force and violence, throwing her  
upon the ground, or paved street, or road, and she was  
permanently injured. The fact, declarative of the law,  
the plea of general issue.

It appears from the evidence in this case that  
was operating an electric railway, between Edgemont  
Edgemont and that about a or on the 16th day of August, 1910  
appellee became a passenger in an electric car, operated  
to Sycamore street in Collinsville, a town in the county,  
final destination of appellee was Edgemont. At the time  
to stop at Sycamore street for the purpose of  
orders to a Mr. Ellis who lives near this street. At  
that shortly after becoming a passenger and while  
the conductor if he would stop the car at Sycamore street  
enough to permit her to deliver some orders to Mr. Ellis,  
he told her that he would stop the car at Sycamore street  
thereupon paid her fare to Sycamore street. At the time,  
ever, Denies having told her that he would stop the car  
at Sycamore street to permit her to deliver the orders,  
claims that he intended to stop the car at Sycamore street  
claims that just before arriving at said street he saw  
motorman a signal to stop there. Appellee testified that  
passing the last street before reaching Sycamore street,  
it became apparent to her that the car was not going to stop  
at Sycamore street and she pushed the button which operated  
car and gave the motorman charge of the car to stop the car  
that the car began to slacken its speed and while  
ing the street she arose from her seat and went to the door  
of the car and stepped out into the vestibule, when the car  
a sudden jerk and threw her from the car, and she was  
injuring her arm, hand, and head, and she was thrown to the ground.

plaintiff with...  
upon the ground, on...  
permanently injured...  
the plea of General...  
the plea of General...

It appears from the evidence...  
was operating an electric...  
agreement and that about noon...  
appears became a...  
to...  
final destination of...  
to stop at...  
orders to a...  
that shortly after...  
the conductor...  
enough to permit...  
he told her that...  
thereafter paid...  
ever, service...  
at...  
claims that...  
claims that...  
motorman...  
passing the last street...  
it became...  
at...  
car and...  
that the car...  
ing the street...  
of the car...  
a sudden jerk...  
injury...  
-1-

started suddenly or jerked or stopped. Appellee claims that she walked out into the vestibule, stepped on the steps and jumped off of the car before it stopped.

The principal question is disputed in this case, whether the appellant, after the appellee came out into the vestibule of the car and while the car was being slowed down, stepped out of the car with a sudden jerk and threw appellee on to the ground, and did she step into the vestibule and wait for the car to stop, or attempt to get off of the car while it was ~~still~~ in motion.

It is insisted by counsel for appellant that the verdict of the jury is manifestly against the weight of the evidence in this case and this is the vital matter presented for determination. It appears from the evidence that there were about fifteen passengers on board this car at the time of the injury, and appellee stands practically alone in her contention that the car after slowing down started up suddenly and gave a jerk and threw her off, while five of the passengers that were on board the car, the motorcar and conductor all say that the car did not give a jerk, and three of the passengers testified that she walked off of the car without waiting for it to stop. Appellee testified, "As the car neared the square where I saw the conductor was busy changing fares; three or four girls got on and I thought he was not going to ring the bell, so I pushed the bell myself and walked to the rear of the car and then it almost stopped. I stepped into the vestibule and I thought they were going to stop; I don't remember anything until they carried me into the doctor's office. I stood up and went to the rear platform with the intention of, as soon as the car stopped, to alight, but there was a jerk and I don't remember anything more until they carried me into the doctor's office. The street was paved. I don't know how it was paved. This is the whole of appellee's testimony. Appellant's declaration that the car gave a sudden jerk and threw her off

[illegible]

into the vestibule. Counsel for appellee contended that Wells testified that the car gave a sudden jerk. Wells testified that he lived west of where the road crossed Sycamore Street. It appears that immediately after the fall on the pavement that Ambrosini, one of the passengers, pulled the bell rope and gave two signals and the conductor immediately gave a third, or danger signal, to stop immediately. The car then stopped suddenly. Mr. Wells in his examination by chief says nothing about the car stopping or jerking out on cross examination he says, "Q--Did you see the car jerk? A--It seemed to jerk to me, it seemed to almost stop and then go forward. Q--Then Mrs. Dallas was lying on the ground? A--Yes; I didn't see her fall out of the car". Mr. Wells was at least one hundred feet west of the car and he was attracted to it. He did not observe the movements of the car until after Mrs. Dallas had fallen on the pavement and this is what attracted his attention to the car.

It is next contended by counsel for appellee that Henry Brecha, a witness for appellant, testified that the car stopped awful sudden; which is true, but as we read this without testimony the sudden and unusual stop referred to is after Mrs. Dallas fell on the pavement and was in consequence of the ~~unusual~~ danger signals given. He says, "I was attracted by the unusual stop; the car stopped. The motorman was in the front of the car and he was going. We saw there was something unusual. I don't know that there were any signals given. I would not say that there were none given. Prior to the time my attention was attracted by the stopping of the car I know of nothing unusual by the motion of the car. I didn't know who had gotten off of the car". While on the part of the witnesses for appellant the motorman Edward testified, "There was no violent jerk or sudden start of the



car prior to the sounding of those signals. (Referring to danger signals). "There was just the stop or stopping of the car while I received the signal. It may have made a violent stop, or unusually long stop."

Jacquet, the conductor says, "Right the car would stop just as nice as you please and was in the front of the car, in the snoker. When the car was going very fast, about to come to a stop, I gave the signal."

Joe Ambrosat, who was engaged upon the car at the time, to the time I gave the two bells after Mrs. Adams stopped, there was no unusual motion or jerk of the car. And again, he says, "I saw this lady get off the car; I saw her when she came out of the door and just walked out, with a bundle in her hand, left; walked on out and placed it on the ground. Seemed to me like she didn't pay no attention to nothing; walked right on out. I saw her when she came out in the vestibule; she was walking fast; when she got outside of the door she just walked right off; her bundle was in her left hand. She was holding it in front of her as she walked out she grabbed the handle with her right hand and walked right on out; she grabbed the handle, facing the back of the car, as she walked out; that is the handle at the rear end of the car. She didn't stop at the rear end of the car, she didn't stop anytime in the vestibule. She was running. I don't remember just how she got off. When she walked off. She was facing out towards the rear of the car. She was holding on to a grab handle; she had her right hand holding the grab handle. She was facing out towards the rear of the car at the act of getting off. Her face was turned towards the rear end of the car".

[illegible]



Roscoe Wilson, another passenger, testified, "At the time that the two signals were given by Mr. Ambrosia, while the car was slowing down, there was no unusual motion of the car, nothing more than usual". "I saw her coming out of the car, step out into the vestibule and walk out, on out into the vestibule; she seemed to be in a hurry. I didn't see her at the door leading from the car proper into the vestibule. She did not stop anywhere from the time I saw her in the vestibule going out, just walked right out of the car into the vestibule and walked and walked right out of the vestibule. When she went out of the car she faced in the opposite direction the car was going. When she walked out into the vestibule she faced the vestibule; she came into the vestibule and started out she turned around of in the direction the car was going".

G.L. Beay, another passenger, testified, "Immediately prior to the time Mrs. Dallas stepped or walked off of the car it was coming to a stop. There was no jolt of the car when she walked off; she was coming to her usual stop. I didn't see Mrs. Dallas until she got on the rear platform, she stepped off the car, she just walked straight off".

The witnesses Ambrosia, Wilson and Beay were standing on the rear platform. Henry Brecke, another passenger, who was seated in the car, says, "Prior to the time the car was stopped was attracted by the stopping of the car I knew of nothing about the motion of the car. I didn't know what had happened to the car".

Paul Fisher, another passenger says, "Prior to the time his attention was attracted to the accident there was nothing unusual about the motion of the car. George Smith, another passenger, says, "Before the signals were given there was no unusual motion of the car that I noticed; it was ordinary running of the car". -6-

to it in the direction the car was going.

[illegible]

Paul Fisher, another passenger, says that at the time his attention was attracted to the sound of the thing unusual about the motion of the boat. "Before another passenger," says Fisher, "noticed the noise, there was no unusual motion of the boat."

The evidence of the witness is not sufficient to preponderates over the testimony of appellee. The evidence that the car did not stop with a sudden jerk, as testified to by appellee and also that she did not step in the vestibule of the car straight out and attempted to get off the car before it started motion. He can see no motive or interest that the witness could have in telling an untrue story about this matter or why due credit should not be recorded to their testimony. It is the duty of a court of review to sustain the verdict of a jury where it can reasonably be done, but here on this appeal upon the consideration of the testimony and the verdict of the jury is greatly against the weight of the evidence then it becomes the duty of such appellate court, as it exists in this case, to reverse the judgment of the trial court. C. & A. R. K. vs. Heinrich--157 Ill., 356.

We have read this record carefully, and feel constrained to hold that the evidence in this case largely preponderates in favor of the appellant, both upon the proposition that the witness of the appellant and the fact of due care of appellee. We agree with the contention of counsel for appellant that it is not reasonable to infer that she desired to avoid the accident. We do not deem it necessary to infer this ~~XXXXXXXXXX~~ from the contention and statement of the witnesses of appellee. It may be that she was absorbed in thought about other matters and not giving the proper attention to alighting from the car. This does not excuse her. While we are not inclined to reverse the verdict of the jury, is manifestly against the weight of the evidence, yet we are not inclined to reverse the verdict of the facts.

The judgment of the lower court is hereby affirmed and the case remanded.

[illegible][illegible]

100-443887-100

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court  
at Mt. Vernon, this 28<sup>th</sup> day of July,  
A. D. 1914.

Clerk of the Appellate Court

# OPINION

*Fee \$*

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DAVID C. GERAGHTY,  
Plaintiff in Error,

vs.

NATIONAL FIRE PROOFING COMPANY,  
Defendant in Error.

Error to  
Superior Court,  
Cook County.

188 I.A. 447

MR. PRESIDING JUSTICE JARNES DELIVERED THE OPINION OF THE COURT.

The record for review is that of a second trial of a case, in the former trial of which a joint judgment was rendered against defendant in error and the William Grace Company. On appeal the judgment was reversed, with a finding of fact here in favor of the latter, and directions for a new trial as to the former. (See 157 Ill. App. pp. 108, 309.) The second trial resulted in a judgment for defendant in error. One of the grounds relied upon for reversing it is the giving of the following instruction:

"If you believe from all the evidence in this case that the plaintiff's employer, the William Grace Company, was negligent in failing to exercise reasonable care in furnishing the plaintiff a reasonably safe place to work at the time of the accident, and that said negligence was the proximate cause of the injury complained of, then you should find the defendant, National Fire Proofing Company, not guilty."

Whether the William Grace Company was thus negligent in failing to furnish plaintiff a reasonably safe place to work at the time of the accident was the very issue raised and decided in its favor on the former appeal and, therefore, should have been regarded as res judicata in the second trial. (Payson v. Village of Milan, 160 Ill. App. 518, Grisebach v. People, 103 Ill. 30.) It was error, therefore, to call upon the jury to rejudicate that question in order to determine whether defendant in error was guilty of the negligence charged against it.

It was also error to direct a verdict without regard





to whether defendant in error was guilty of negligence; for it was to determine that question that the evidence was submitted to the jury, and the instruction requires them to ignore it. Defendant in error may have been concurrently negligent even if the proximate cause of the injury was the negligence of the William Grace Company. (Seith v. Commonwealth Elec. Co., 241 Ill. 253, McGary v. West Chicago St. R. R. Co., 89 Ill. App. 310.) The error in giving this instruction requires us to reverse the judgment and remand the case for a new trial.

Another instruction improperly singled out one fact in the chain of evidence for the consideration of the jury. Whether any of the other points urged for reversal constitutes error we deem doubtful, but we need not review them as they are not likely to arise on another trial.

REVERSED AND REMANDED.



1917, 1918

316 - 19715

THE CITY OF CHICAGO,  
Defendant in Error,

vs.

CHARLES MURPHY,  
Plaintiff in Error.

Error to  
Municipal Court  
of Chicago.

183 L.A. 449

MR. PRESIDING JUSTICE FARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was convicted in the Municipal Court of Chicago on the charge of being connected with the management and operation of premises in the city of Chicago kept for the purpose of permitting persons to gamble in violation of an ordinance of said city. The only proof of the venue was that the gambling took place at "3235 South State Street," but of what city does not appear in the record. Whatever may be the rule elsewhere, the courts of this state will not take judicial notice that streets mentioned in the record are located in any particular city. (*Dougherty v. The People*, 113 Ill. 185, *Cunning v. The People*, 189 id. 165.) Nor does the record reveal any fact or circumstance showing by necessary inference that the place designated must be in the city of Chicago. For aught that appears, it may be in some other city. Proof that the act was committed in the city of Chicago was essential both to the jurisdiction of the court and the enforcement of the ordinance, and such proof was essential to a valid conviction. (*People v. Lewis*, 115 Ill. App. 493.) The judgment, having been rendered upon insufficient proof, must be reversed and the cause remanded.

REVERSED AND REMANDED.



er Term, 1925

230 - 18720

MARGARET CAREY,  
Plaintiff in Error,

vs.

CHICAGO RAILWAYS COMPANY,  
Defendant in Error.

Error to  
Superior Court,  
Cook County.

1881A 450

MR. PRESIDING JUSTICE EARNES DELIVERED THE OPINION OF THE COURT.

One of the points assigned as error on this record is the modification by the court of an instruction tendered by plaintiff in error by substituting for the word "will" the word "may" in the final clause of the following instruction:

"The court instructs the jury that it is the duty of plaintiff to prove her case by a preponderance or greater weight of the evidence and if the jury believe that the evidence bearing upon the plaintiff's case, as laid in her declaration or any count thereof, preponderates in her favor, they may find the defendant guilty."

That a jury should find for the party that proves his case by a preponderance of the evidence is not a debatable proposition. The law makes it mandatory. To tell the jury they may so find is to convey the idea that it is discretionary, and is, therefore, misleading. To be sure, the word "may", as used in statutes or where public duty is involved, is often used in a mandatory sense, but otherwise it is usually used in a permissive or discretionary sense, and would be so understood by a jury.

The purpose of the instruction as offered was to direct a verdict for plaintiff if the jury found the evidence preponderated in her favor. In marked contrast with it as claimed the jury were told by instructions given in behalf of defendant that if plaintiff has failed to prove certain matters by a pre-



ponderance of the evidence, the "cannot recover", and if the evidence did not preponderate in favor of plaintiff "or if it preponderated in favor of the defendant \* \* \* then you are instructed to find the defendant not guilty." The jury should not have been left in the dubious position of exercising a discretion as to one party and following mandatory directions as to the other, with respect to the same subject. The instruction should have left no room for such discrimination and the ordinary jury would not make the refined distinctions drawn by defendant in error.

The verdict in such a case being mandatory, the word "shall" or "should" is the proper one to employ. The fact that there is much confusion in the ordinary use of the words "shall" and "will", gives little force to the criticism that the instruction, as tendered, improperly employed the term "will." The misleading character of the instruction is sufficient in itself to require us to reverse the judgment and award the cause.

But another error assigned as to the rejection of certain evidence may arise on another trial. The gist of the action was a wanton and malicious assault by defendant's conductor in ejecting plaintiff from its car. Plaintiff swore that she gave the conductor a transfer. In this she was corroborated by the testimony of another passenger who also swore that she told the conductor before ejecting plaintiff that she had paid her fare. But the testimony of plaintiff, that said passenger so told the conductor, was stricken out as hearsay evidence. If she did not pay her fare, then he could, without using unnecessary force, rightfully eject her. But if she did pay her fare, the act was wrongful, and any information the conductor had before so ejecting her that she had paid her fare was material and direct evidence bearing on the question of malice and the character of his subsequent conduct. The court, therefore,





error in striking out such testimony. While it is doubtful whether any other assignment is well taken, the judgment will be reversed and the case remanded for the reasons stated.

REVERSED AND REMANDED.



April 1968.

vii.

*Ag. allante.*

Appeal from  
Municipal Court  
of Chicago.

1881.4.51

MR. PRESIDING JUSTICE HARNES DELIVERED THE OPINION OF THE COURT.

Appellee, a manufacturer of barrel hoops at Fort Wayne, Indiana, doing business in the name of Wayne Hoop Company, sued appellants for the purchase price of a carload of hoops shipped to the latter at Savannah, Missouri. Appellants did not deny liability therefor, but filed a set-off for damages in delaying delivery. By agreement between them, the claim of appellee was adjusted and the case heard on appellants' claim of set-off as if on an independent action therefor. Appellants therefore assumed the burden of proof and at the close of their case the court, on motion therefor, directed a verdict for appellee. The only question presented is whether the court was justified in so doing.

The contention of appellants was that there was evidence tending to show a complete oral agreement between the parties and appellee for a breach thereof, and appellee's contention was that the oral agreement was merged in a subsequent written agreement, as to which there was no proof of damages.

The record shows that Reginald A. Tateon, one of appellants, testified that the dealings were by conversations over the telephone with one Williken, a Kelley's agent, about August 28, 1910; that in a conversation on August 31st the latter expressly promised and agreed to have a car containing 60,000 boxes rolling



by September 2nd and delivered at Savannah, Mo., by September 5, 1910, without fail, at the price of \$10.25 per thousand, and that thereupon Watson said: "You can take the order and I will wire you tomorrow so that you will have something to show for this order." Accordingly, the next morning he sent appellee the following telegram:

"Ship Savannah, Mo., car to be rolling night of September second sixty thousand number one also hoops six feet.

C. A. Watson & Co."

and wrote appellee a letter saying:

"This confirms our wire this date instructing you to load car 50,000 No. 1 also hoops 6 ft., to be rolled to ourselves Savannah, Mo. Car to be loaded and rolling Friday night, Sept. 2, 1910. Price to be 66 per your quotation \$10.25 per M. F. O. B. above destination, terms to be 30 days net. We may want part of this car at Amazonia with a stop off at Savannah to partly unload. Then if we wish all car to Savannah can unload same there. Kindly forward E. L. to us promptly so that we can trace to destination and you also trace as we are waiting for stock and if same is satisfactory you will hear from us with further business. In haste,

C. A. W. & Co., R. A. Watson."

A letter of same date, answering said telegram and signed "Wayne Hoop Co.," was as follows:

"In line with your telegram of even date we enter your order for carload of 50,000 - 6 - 6 hoops to be shipped Savannah, Mo., which we will let go forward either Saturday or Monday. If we can get them out tomorrow, will certainly do so, but hardly think our mill will be able to get them out.

After the car leaves our mill, we will have it followed with a wire tracer, and have it rushed through to you without further delay."

On September 2nd, appellee replied to appellants' letter as follows:

"We have your favor confirming your telegram of even date. We wrote you yesterday, acknowledging receipt of your order, which we wired you we could get on the way either Saturday or Monday of next week. We note you want us to bill this shipment to you at Amazonia, Mo., with a stop off at Savannah, and have taken this matter up with our mill to do this. It is a little doubtful whether they will allow us to do this, as the western railroads as a rule do not allow stop offs.

Our traffic manager has not rate to Amazonia, Mo., and we presume it takes St. Joseph rate of freight. If not, we will expect you to stand all over this.

Yours truly,  
Wayne Hoop Co."

After receiving the two letters from appellee, appellants wired on September 6th: "Just arrived Chicago. Note



letter second. Is car rolling? Send number and routing," and on September 8th: "Why don't you give us car number routing car hoops. Must have car at once to prevent serious damage."

Other correspondence was introduced in evidence not material to the consideration of the questions before us.

No evidence was offered in behalf of appellee, and we think the record supports the inference that when appellee wrote the letters of September 1st and 2nd, saying that carload would go forward on Saturday or Monday (the 3rd or 5th), either he did not know his agent had made an oral agreement the day before that was to be confirmed by said telegram, or he sought a modification thereof as to the time the car should go forward, which would delay delivery from one to three days. So far as the question before us is concerned, it is immaterial whether appellants assented to the modification or not, if there was a complete and binding oral agreement.

From a careful examination of the record we think, therefore, the evidence tends to show a complete oral contract made by telephone with appellee's manager on August 31, 1910, to deliver them by September 5th a carload of hoops, containing 80,000, at \$10.25 per thousand, at Savannah, Mo., and that the letter and telegram of September 1st were intended merely to confirm such agreement.

Appellee urges that appellants' telegram and letter constitute an abrogation of the oral agreement if entered into, but later in his brief argues that at no point in the transaction was there an offer by one party that was met in every respect by the acceptance of the other. If the latter contention is well taken, the former cannot be.

Said telegram and letter are not necessarily inconsistent with the oral agreement testified to. In fact, together they are capable of being construed as a confirmation of it, accompanied with



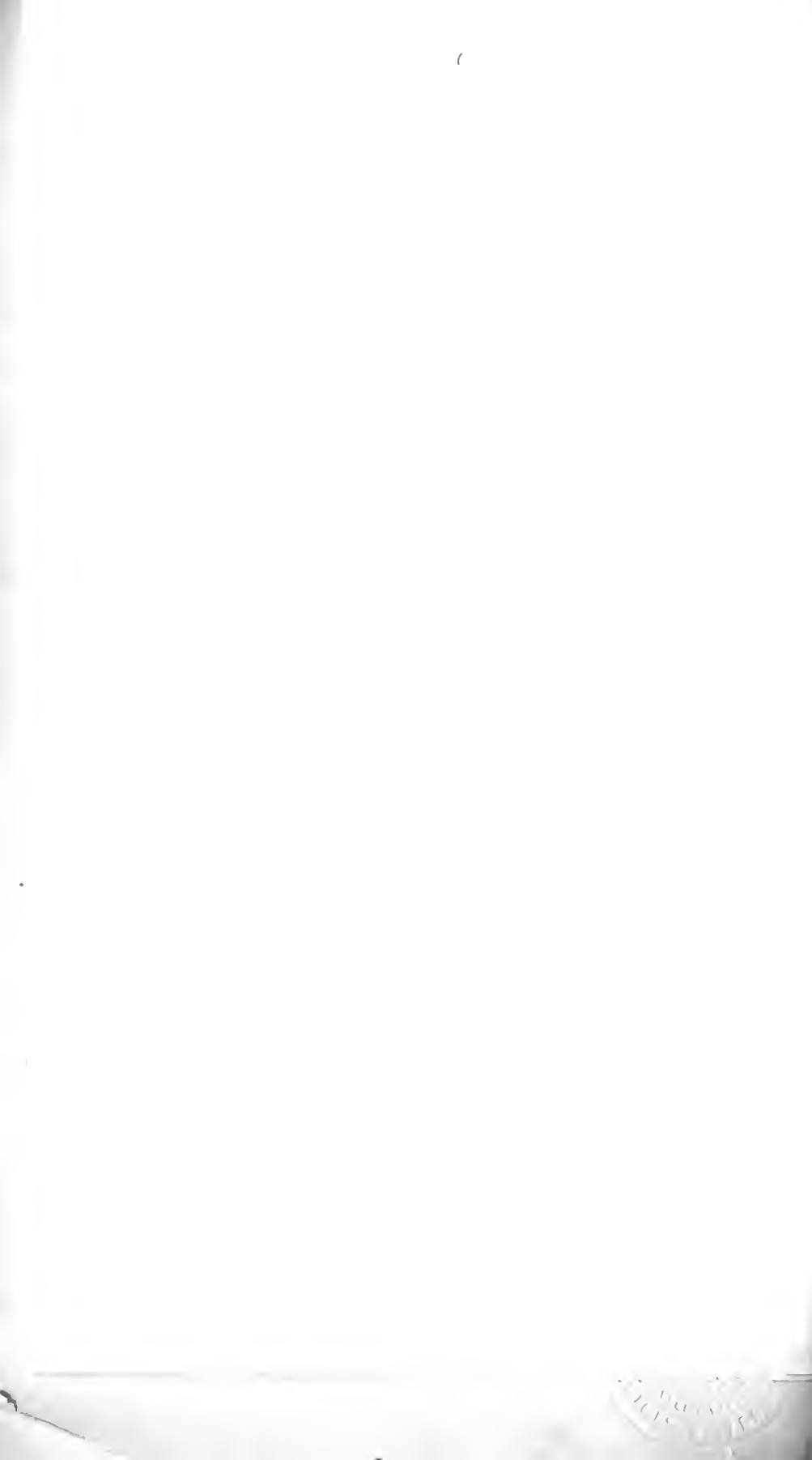


a mere request for a change of destination as to part of the goods, with which appellee expressed a willingness to comply if practicable, and there is nothing to indicate that acceptance of the change depended on compliance with the request. It was, therefore, an important question of fact for submission to the jury whether there was such an oral agreement.

It is urged that the telephone conversation on August 31st was merely a tentative agreement, but unless the subsequent communications clearly negative the positive testimony of a complete oral contract, it remained an open question of fact for the jury to determine, when the court directed the verdict, whether such oral agreement was entered into.

Nor can we agree with appellee's contention that the evidence furnished no basis for the computation of damages. The court should have put appellee to his defence, and if he refused to make any, have submitted the case to the jury.

REVERSED AND REMANDED.



399 - 19801

J. A. SHEWERDICE, alias  
J. A. Stewardbridge,  
Appellee,  
vs.  
CHICAGO CITY RAILWAY COM-  
PANY,  
Appellant.

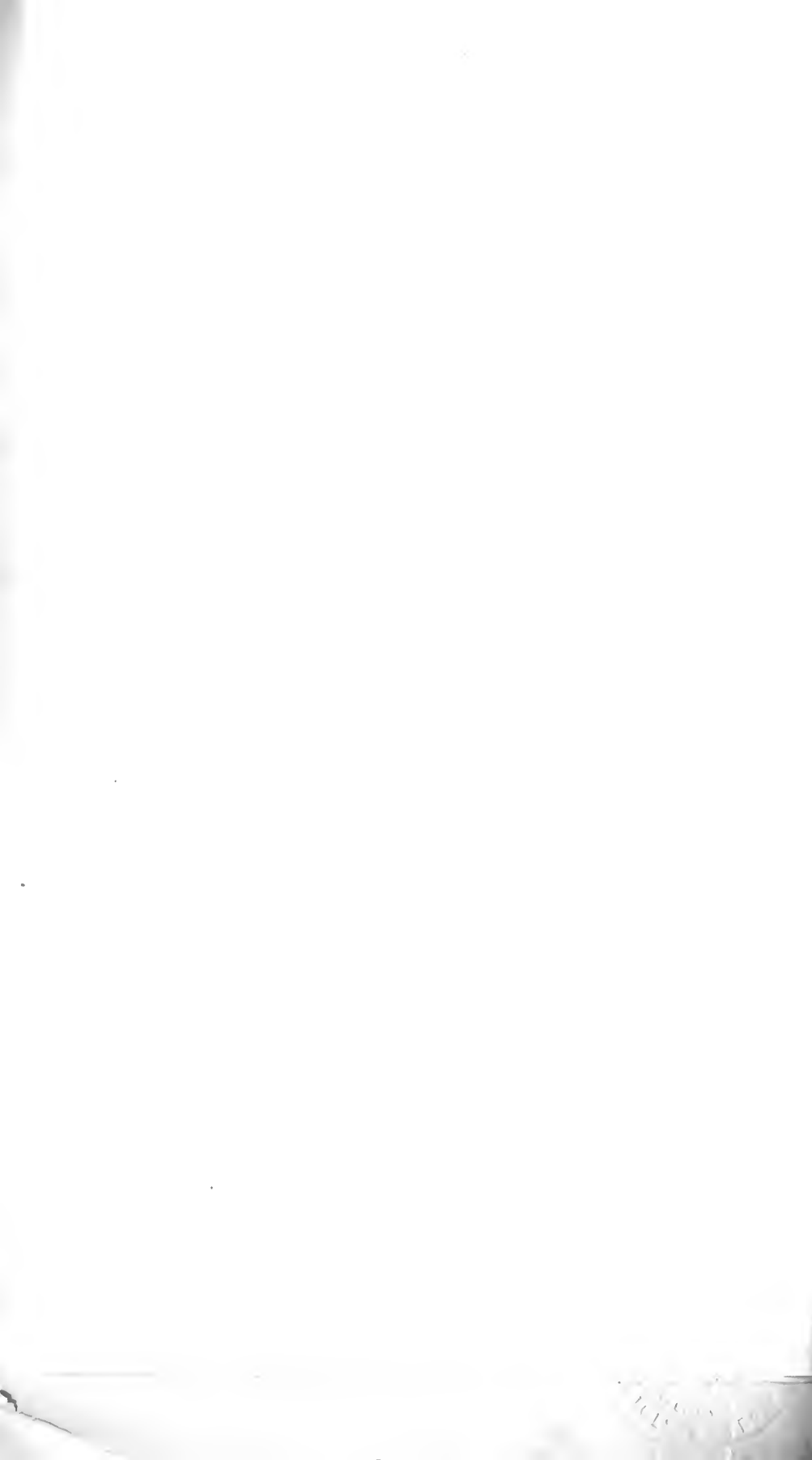
Appeal from  
Superior Court,  
Cook County.

188 I.A. 454

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for \$5000 in an action for personal injuries resulting to a passenger on defendant's car from a collision between it and a horse and wagon at the intersection of Princeton Avenue and 56th Street, while the car was going west on the former and the team north on the latter. The accident happened after dark, about 7:30 p. m., December 24, 1910.

The action is grounded on the claim of negligence by the motorman in approaching the crossing, (1) in propelling the car at too great speed; (2) in failing to keep a proper lookout, (3) in not having the car under proper control; (4) in failing to sound the gong. While it is doubtful whether there was sufficient testimony to support either of the last two contentions, there was evidence tending to establish, directly or by inference, one or both of the first two contentions, so as to require submission of the case to the jury; and, while it is contended that the verdict is against the manifest weight of the evidence, we have reviewed it with the conclusion that we would not be warranted in disturbing it on that ground. The rate of speed was a controverted fact, which, together with the circumstances of the accident, including time and place, fairly presented issues for the jury's determination, and the verdict should stand unless complaint that it is ex-

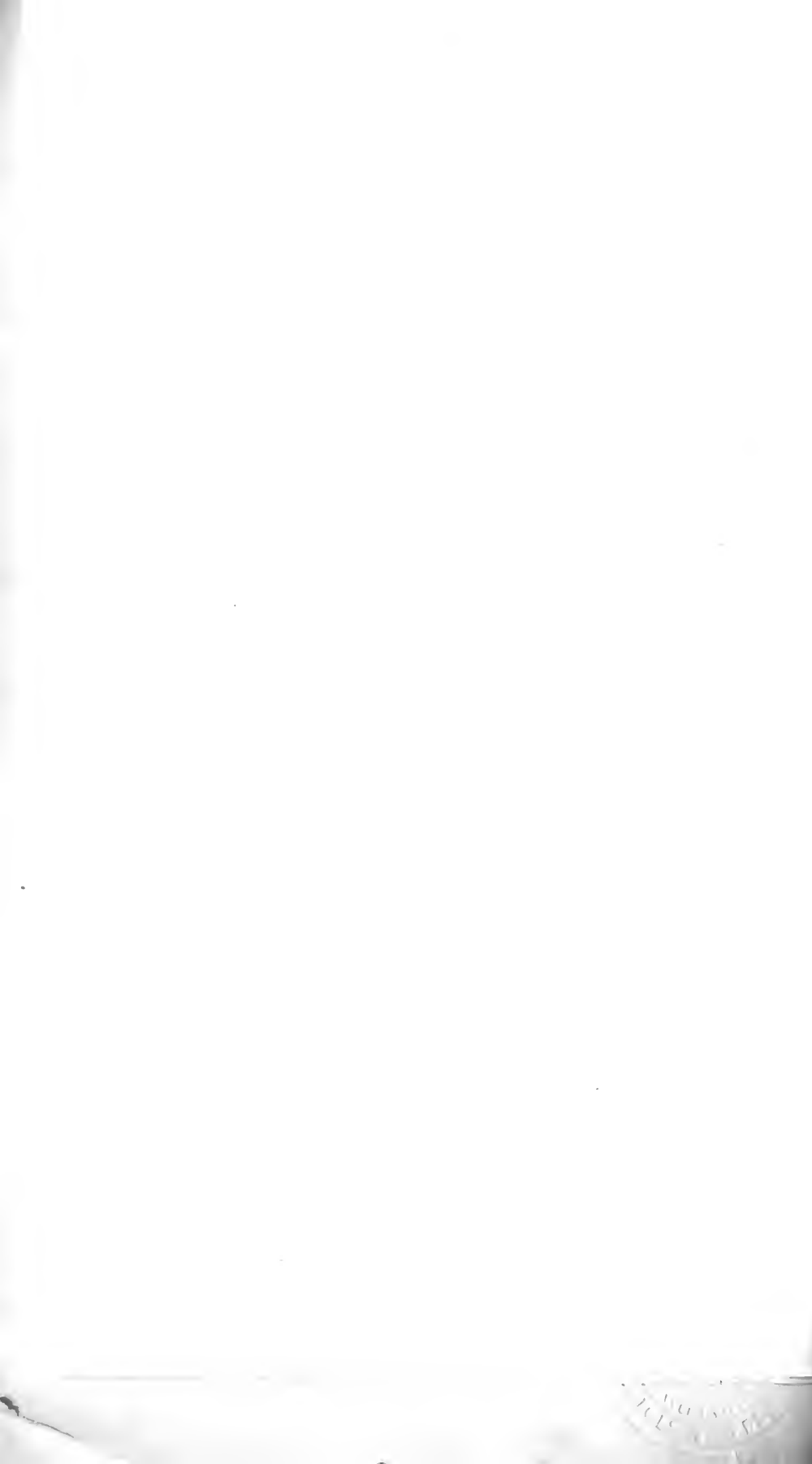


cessive in amount, or that there was prejudicial error, is well taken.

It is urged that plaintiff's injuries are not permanent and that as he received his wages during the period of disability, the verdict and judgment are excessive. Plaintiff was rendered unconscious and received a fracture of the skull, necessitating the removal of a portion thereof which left a depression about one-third of an inch deep and two inches long where the brain is now apparently covered by connective tissue and cartilage only. This condition is unquestionably permanent, and headaches and dizziness have continued to the present time, and for about a year pains in his head were continuous. Under such conditions and consequent suffering, we cannot say that the judgment should be disturbed because of its amount.

We pass, therefore, to the claims of prejudicial error.

Plaintiff's counsel called the driver of the wagon to the witness-stand, and after asking merely his name and address, announced that he had no further questions to ask him. It is contended that this amounted to an open and unfair challenge before the jury that appellant proceed to examine the man it blamed for the accident. The record shows some colloquy and legal sparring between counsel for advantage from the incident, and the final dismissal of the witness without further examination, counsel for appellant saying, "We will let the jury hear from us both on that," and not calling upon the court for any ruling relating thereto. While the court might have appropriately retuked such proceeding, which tended to convert the trial into a mere game, yet appellant is in no position to urge as error that of which it made no complaint below, but which, on the contrary, its counsel sought to use for its own advantage.



Complaint is made of refusal to give the following instruction:

"T. "The law does not regulate the precise rate of speed at which a street car must be run under any given circumstances, nor does it require that street cars be run at such a low rate of speed that would prevent the practical operation of the railroad's business as a public carrier of passengers. There is no law limiting the rate of speed to any given number of miles. The law only requires that those operating the car exercise towards passengers the highest degree of practicable care, as defined by these instructions, and if you believe from the evidence, and under the instructions, that the rate of speed at which the car was being run at the time and place of the accident was, under the circumstances in evidence in this case, not inconsistent with the exercise of the highest degree of practicable care as defined herein, on the part of those in charge of the car, then no negligence can be charged to the defendant in the operation of the car on the ground of the speed at which it was running."

It is contended by appellee that such instruction violates the rule against singling out and directing the jury's attention to one of a series of facts,- that relating to the car's speed. We hardly think it stenable to this criticism as it distinctly directs consideration of the evidence on that point with the other circumstances in evidence in the case. But, we think no prejudicial error resulted from refusal to give it. No contention was made that defendant was limited to any particular speed and the jury were told in another instruction that the exercise of the highest degree of care by defendant did not require it to run its cars with such a degree of care and caution as would prevent practical operation of its business, and that if the accident could not have been prevented, except by the exercise of such care and caution as would prevent such practical operation, then the jury should find for defendant. We think the latter instruction included all that was material in the one refused.

The other instruction refused, of which appellant complains, was subject to the criticism of leaving the jury to determine for itself from the declaration and without any other instruction on the subject to guide them, what were the material points of the case. This form of instruction has frequently been con-





damned (Baker & Reddick v. Summers, 201 Ill. 57; Casey v. Chicago City Ry. Co., 237 id. 146.) While, as appellant argues, another instruction given for plaintiff directed a verdict on the finding of certain facts which really constituted the material issues of the case, yet the jury were not so told. What were the material allegations of the declaration and issues of the case, were questions of law, which the instruction erroneously left the jury to determine for themselves. (Baker & Reddick v. Summers, supra.)

Prejudicial error is also claimed in instructing the jury that in determining the amount of damages they should consider evidence of "future suffering and loss of health," etc., appellant contending there was no evidence to justify consideration of such matters. As already stated, there was proof of the recurrence of pains in the head and dizziness up to the time of the trial. Their future continuance might well be inferred and deemed prejudicial to health.

It is also urged that there was error in giving the following instruction:

"6. The court instructs the jury that it is the duty of common carriers to do all that human care, vigilance and foresight can reasonably do under the circumstances, and in view of the character of the mode of conveyance adopted, and the practical operation of the road, reasonably to guard against accidents and consequential injuries, and if they neglect so to do, they are to be held strictly responsible for all consequences which directly flow from such neglect (provided such neglect and consequences is alleged in the declaration and established by the proofs); that while the carrier is not an insurer of the absolute safety of the passenger, it does, however, in legal contemplation, undertake to exercise the highest degree of care to secure the safety of the passengers and is responsible for the slightest neglect resulting in injury to the passenger (provided such neglect and injury is alleged in the declaration and established by the proof) if the passenger is, before and at the time of the injury, exercising ordinary care for his own safety."

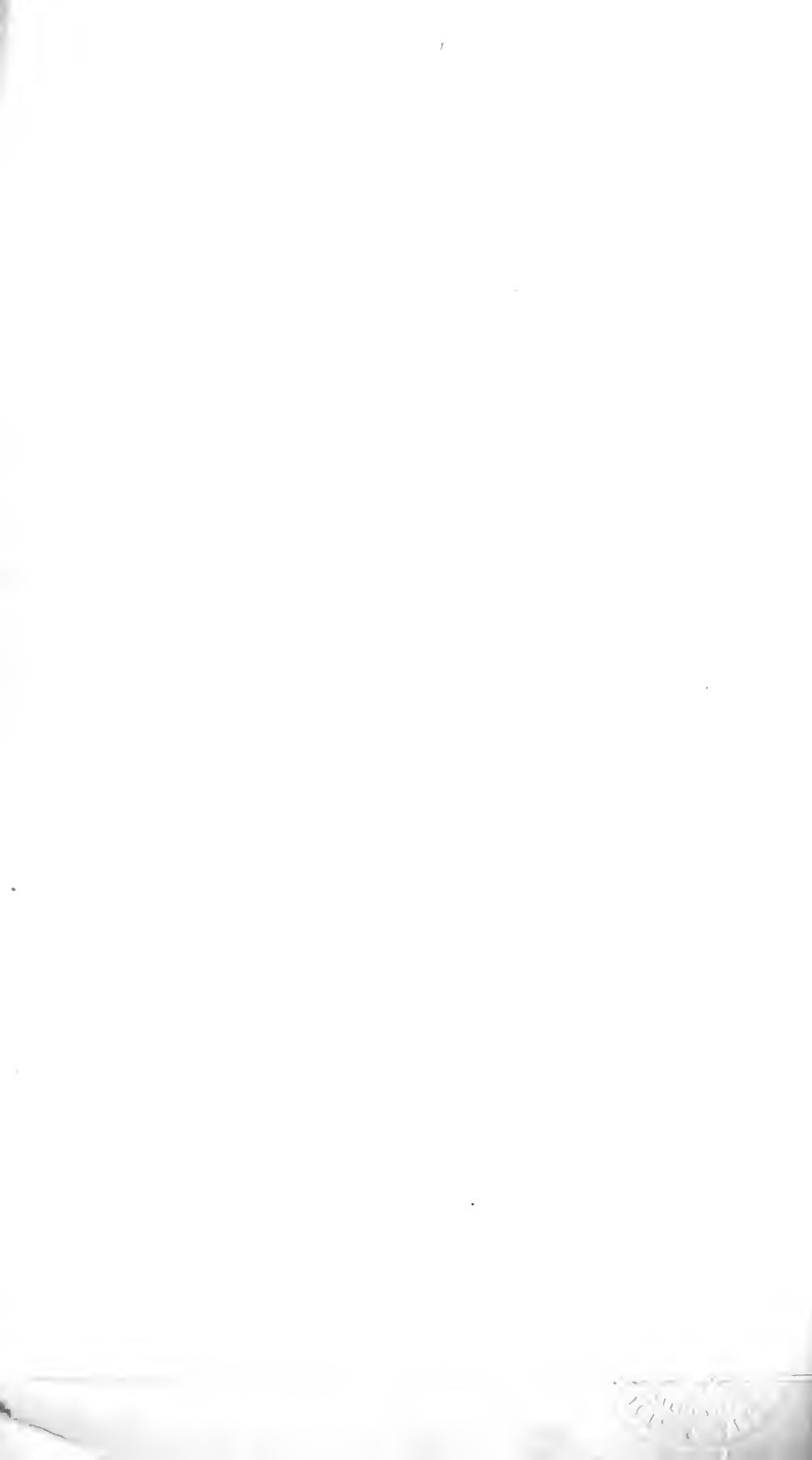
The point made is that while the instruction has been approved on other grounds of criticism (Chicago St. Ry. Co. v. Shreve, 226 Ill. 538), it has not been considered with reference to the objection here raised that the last part of it (following



the semi-colon) omits to limit the degree of care to such as is consistent with the practical operation of the car line; that the instruction is practically the combining of two different instructions on the degree of care to be exercised by defendant, one of which is incorrect and, therefore, misleading. In view of the fact that another instruction was given, above referred to, explicitly embodying the limitation aforesaid, and that reference to the same limitation is again made in the first part of the instruction complained of, it is hardly probable that the jury separated the two parts of the instruction and, observing the failure to repeat the limitation in the second part, were misled or confused as to the extent of care to which defendant was held in law. If it were the only instruction on the subject, the criticism might possess some merit. As it is, it seems more or less hypercritical.

We do not think that there was such error as would justify a reversal of the case.

AFFIRMED.



er Term, 1918, No.

423 - 19826

ADVANCE AMUSEMENT CO.,  
Appellee,

vs.

FREDRICK H. FRANKS,  
Appellant.

Appeal from  
Municipal Court  
of Chicago.

188 I.A. 457

MR. PRESIDING JUSTICE LARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for plaintiff in a suit brought by it as lessee, to recover the sum of \$2500 deposited by it with appellant, the lessor, pursuant to certain provisions of the lease entered into between them March 11, 1912, for a term ending February 28, 1917, at a rental of \$350 per month. By reason of default and failure to pay rent for December and a portion of the rent for November, 1912, the lessor, after giving the statutory five days' notice, brought suit for possession of the premises, obtaining judgment therefor December 17, 1912. The judgment here appealed from was for the sum of said deposit, less the amount of rent that had accrued and remained unpaid to the date of the termination of the lease as aforesaid.

While there are several assignments of error, none are argued save the question whether the sum so deposited should be construed as liquidated damages or a penalty. Following the established practice, we shall consider this question alone, the other points raised by the assignments but not argued being waived.

It is true, as contended by appellant, that the intention of the parties must govern the construction to be placed upon the contract, but, as stated in Cobble v. Binder, 76 Ill. 157, "it is the difficulty in ascertaining what was meant that has given rise to so many conflicting cases." Where, from the nature of the case and the tenor of the agreement, it is apparent that damages have already



been the subject of actual and fair calculation and adjustment, the damages being uncertain and not capable of being ascertained, they will usually be considered as liquidated (*Gobble v. Linder, supra*, 159), but when there is language in the contract indicating that the damages that may arise from its breach were not irrevocably fixed and settled by the parties, the inference, in harmony with the policy of the law against favoring forfeitures, would be against the conclusion that the declared sum was intended as liquidated damages, even though the parties so denominated it.

The language of the clause of the lease relied on by appellant is that in the event the lease shall be terminated by reason of a breach of the second party of any of its terms and conditions by him to be performed, "then and in such event the party of the first part may at his option retain as for and in full of liquidated damages the said sum," etc.

In *Kay Gee Amusement Co. v. Cave*, 177 Ill. App. 250, the use of the same language in a lease there under consideration was held to militate against the contention that the damages should be regarded as liquidated. Surely, the lessor's option as to regard them or not, thus giving the alternative to claim greater damages, is incompatible with the view that the parties have calculated and adjusted in advance the damages that may arise from breach of the contract, and inconsistent with the theory that their minds met in a mutual intention to that effect. We need not reiterate what was said upon that subject in the case above cited. We think its reasoning sound and conclusive of the question here raised. Regardless of any other language in the contract, which, taken by itself, might support a contrary conclusion, we think the reservation of said option requires us to construe the deposit in the nature of security, as it is designated in another part of the lease, and, therefore, as a penalty and not as liquidated damages.





The words, "at his option," cannot be ignored in gathering from all parts of the contract, as we must, the intention of the parties. If they intended the sum deposited to be liquidated damages, which, in their very essence, mean a fixed and settled sum agreed upon as the actual damages, these words, leaving it optional with the party suffering the damages as to regard them or not, would have no significance whatever. Without them, we might readily adopt appellant's construction and deem pertinent the authorities he relies upon. In none of the cases cited by him, however, did the contract under consideration contain these words or any similar reservation or condition. In each of them the agreement as to liquidated damages was clear, explicit and unconditional. The case of Pinkney v. Weaver, 216 Ill. 185, cited by appellant, is not in point. There the contract made it optional with the vendor of real estate to forfeit and determine the contract, but retention of payments made thereunder as liquidated damages was not optional.

We think the court below properly construed the deposit as a penalty. Whether the testimony warranted a larger deduction from the deposit as damages sustained, we need not consider as the point is not argued.

AFFIRMED.



to be

443 - 19846

MARCUS SACHS,

Appellee,

vs.

CHARLES F. GIESENSCHLAG et al.,  
on appeal of CHARLES F. GIESEN-  
SCHLAG,

Appellant.

Appeal from  
Municipal Court  
of Chicago.

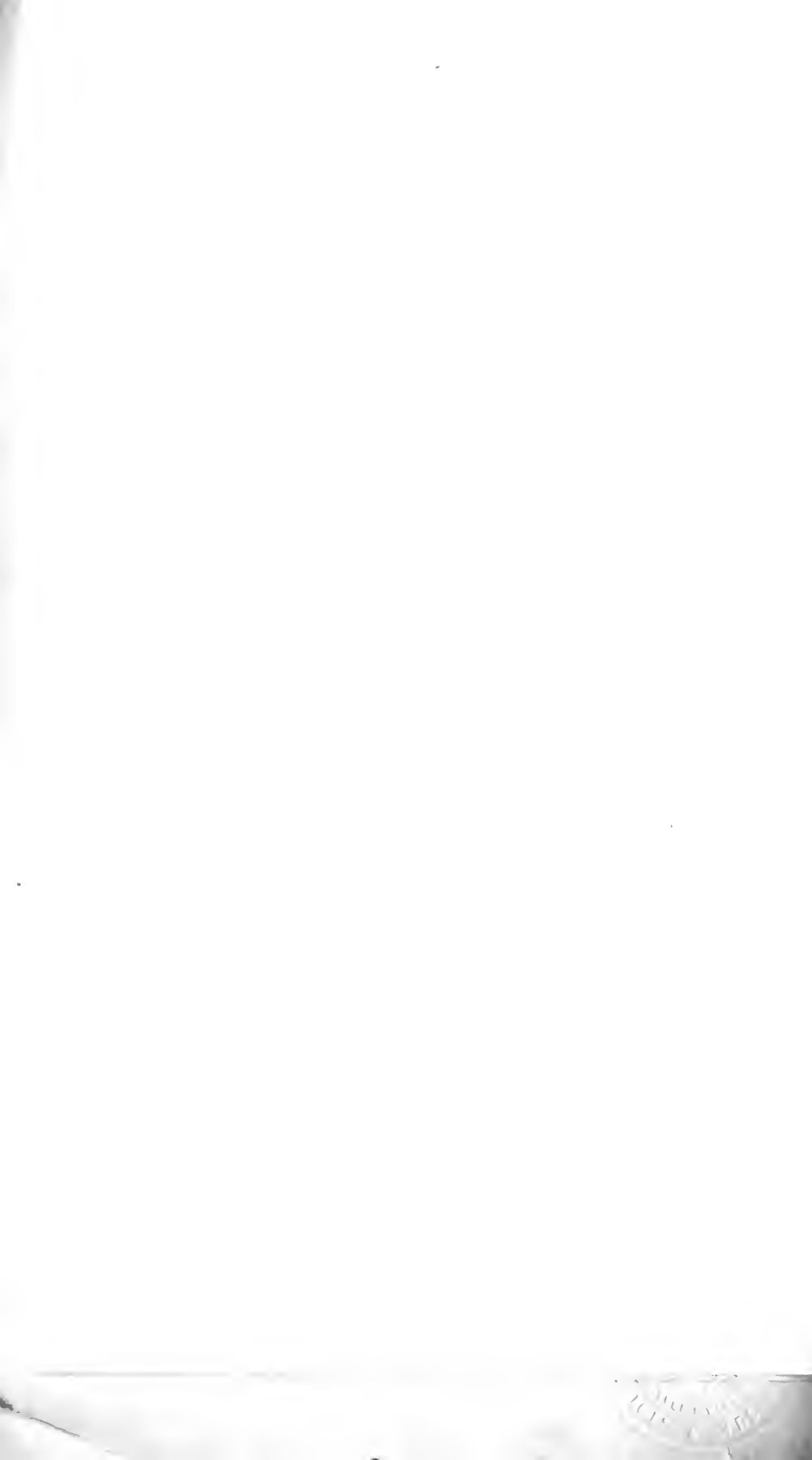
188 I.A. 462

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

In a suit for an accounting between Marcus Sachs and Simon Sachs, copartners, a money decree in favor of the former was entered, and in default of payment thereof a receiver was appointed to hold the property until sold and disposed of under the orders of the court. An appeal by the latter from that decree having been dismissed, this suit was brought on the appeal bond, and this appeal brings up for review a judgment against one of the sureties, the appellant herein.

To the cause of action it was pleaded below that the receiver took possession of property belonging to Simon Sachs sufficient in value to pay the decree, costs and interest, and that said decree gave appellee herein a first lien thereon, and it is contended here that the possession of the receiver under such circumstances was a satisfaction sub modo the same as a levy by virtue of an execution on property sufficient to satisfy the judgment upon which it is issued.

The undertaking of appellant was not to pay the decree upon condition it should not be satisfied out of the property in the hands of the receiver, but that it should be void upon condition that Simon Sachs should prosecute his appeal with effect and pay the amount of the decree, costs, interest and damages rendered and to be



rendered against him in case said decree should be affirmed, - otherwise it was to remain in full force and effect. In the case of *Mix et al. v. People, etc.*, 86 Ill. 329, a similar defense to a suit upon a bond was interposed and the court said: "The parties, in all such cases, are bound by the terms of their contract - they must pay upon the occurrence of the contingencies upon which they agreed to pay." We think that case decisive of the question here involved.

Besides the damages and costs incurred on the appeal were not included in said accounting or the decree rendered thereon, and as to the recovery of their amount, the right of action on the bond would not in any event be suspended. Nor could appellee be required to split his cause of action. Needless to say, there could be but one satisfaction of the sum decreed to be paid, even if enough was realized from the property in the hands of the receiver for that purpose, and if satisfied by appellant, he, doubtless, could be subrogated to the debtor's right pro tanto to funds in the hands of the receiver.

Other reasons might be suggested why the position taken by appellant is untenable, but we need not discuss them for, unless the doctrine of satisfaction can be invoked, there was no defense to the action. It is unnecessary, therefore, to consider questions relating to the admission of evidence. The judgment will be affirmed, but we are not disposed, as requested by appellee, to view the appeal as prosecuted for delay.

AFFIRMED.



20804

POSTAL TELEGRAPH-CABLE COMPANY  
OF ILLINOIS, a corporation,  
Appellee,

vs.

ROBERT STAEBLE, doing bus.  
etc., et al.,

Appellants.

Appeal from  
Circuit Court,  
Cook County.

188 I.A. 464

MR. PRESIDING JUSTICE PARKES DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order granting an injunction and denying the motion to dissolve the same. Pursuant to the prayer of the bill, it restrains defendants Staebie and his attorneys, Clark and Clark, from prosecuting pending suits and bringing further suits at law on assignments of wages made by complainant's employee, and from extorting or attempting to extort money from them.

In its material parts the bill avers that complainant employs a large force of skilled persons to whom defendant Staebie has made loans at exorbitant and usurious rates of interest on their individual notes secured by assignments of their wages earned and to be earned for a period of ten years, each with an annexed power of attorney to make certain waivers and confess judgment for the amount loaned with usury, attorneys' fees, etc.; that complainant has endeavored to comply with such assignments with the result that employees quit its service and its business was thereby injured, that it made an agreement with defendant Staebie for partial payments each month on certain of said loans but that Staebie disregarded the same, demanding payments in full and resorting to the courts for the enforcement of said assignments and his claims; that several suits based on





said assignments are pending against complainant and other suits are threatened, and that the other two defendants, his attorneys, are conspiring with him to bring such suits.

Connected with these averments are allegations in general terms, unsupported by averments of fact, that the assignments were procured by fraud, misrepresentation and duress, and that defendant Stashie has 'extorted' and is attempting to extort illegal sums of money and the wages of said employees.

In the absence, however, of any averments of fact to support the pleader's conclusions as to misrepresentation, fraud, duress, extortion or conspiracy, the bill sets forth nothing that is illegal in the transactions except usury, the only penalty for which is forfeiture of interest, (Bond v. Forsell Co., 86 C. C. A. 546) and which is available as a defense so long as any portion of the debt remains unpaid. (Mason v. Pierce, 141 Ill. 131.)

It is admitted in the argument for appellee that bona fide assignments of wages are not illegal in this state, and that the purpose of the bill is not to prevent defendant Stashie from loaning money or even from receiving usury or the assignments of wages as security for loans, but to prevent the use of such assignments to extort money from complainant or its employees to the injury of complainant's business. In the absence of essential averments of fact as aforesaid it must be inferred that the pleader regards the assertion of defendant's legal rights under the assignments as constituting extortion and conspiracy. If the loans are legal and the assignments valid, the mere fact that complainant's business is or may be injured by the enforcement of such assignments presents no case for equitable relief.

Nor can complainant, at least without having tendered the amount justly due defendant, create a case for equitable relief by paying employees their wages after receiving notice of their assignment. No equity arises from the mere fact that the



assignors will leave its employ in case it recognizes the binding force of such assignments.

Nor does payment to the assignors under such circumstances present a case of subrogation as contended for. The assignors are legally liable for the amounts of their loans and bound by their assignments, (Independent Credit Co. v. So. Chi. C. Ry. Co., 121 Ill. App. 525) and if complainant wilfully disregards their effect, it is difficult to understand how it thereby acquires the right of subrogation.

But, to give color to a right for equitable relief, complainant claims a right to discovery and an accounting. Its right thereto is predicated upon the claim that it has no means of knowing the number and amount of such assignments, and that it has paid its employees wages so assigned in order to retain their services and to prevent defendant using such assignments "to extort money to which he is not entitled." But it is not liable on any assignment of which it has received no notice before payment, and, in the absence of any allegation in the bill of its inability to acquire such information either from its employees or said Steele, or that they have refused to give it, no case for a discovery is shown even if complainant is otherwise in position to assert such a right. As before stated, there are no facts alleged to support the charge of extortion or any defenses to Steele's claims not available at law.

Nor does the bill allege facts tending to show, as claimed, that the assignors were not chargeable with knowledge and the effect of the written instruments they executed, or facts constituting a conspiracy to injure complainant's business.

To the further contention of equitable jurisdiction to prevent a multiplicity of suits, it is enough to say that the only suits that can be brought against complainant are upon such



assignments. No one suit could settle any controversy of fact or law in the others. On the theory of avoiding a multiplicity of suits, complainant seeks to adjust in one suit by or accounting the several rights of action which it has voluntarily invited against itself by disregarding notices of what it admits were legal assignments, and as to which anything in the bill constituting a defense would be available at law. The bill sets up no facts that confer on it an actionable interest or that authorize it to come into equity and litigate for its employees, singly or collectively, the question of what is due from them on their several transactions with defendant Steehle. No irreparable injury or legal liability of defendants therefor, or other recognized grounds for an injunction are disclosed in the bill.

The injunction was granted on the reading of a bill, essential allegations in which are verified on information and belief. It has been frequently held that in such a case a preliminary injunction will not be granted. (See *Schroth v. Siegfried*, 162 Ill. App. 595, and cases there cited.) The motion to dissolve the injunction should have been granted.

REVERSED.



CHARLES A. FUTLER,  
Appellant,

vs.

GEORGE KIRBY and HELENA C.  
KIRBY,

Appellees.

)  
) Appeal from  
) Circuit Court,  
) Cook County.

188 481  
I

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On January 8, 1912, Charles A. Futler filed his bill of complaint in the Circuit Court of Cook County against George Kirby, Helena C. Kirby (wife of George Kirby) and William Mühlenfeld, defendants. The bill alleged, inter alia, that on November 12, 1912, Futler recovered a judgment in the Municipal Court of Chicago against said George Kirby in the sum of \$126.59, upon which execution was issued and returned unsatisfied; that previous to the rendition of said judgment George Kirby was the owner of an undivided one-half interest, as joint tenant with said Helena C. Kirby, in certain premises in Cook County; that on February 2, 1912, previous to the rendition of said judgment but after the indebtedness upon which the same was rendered had accrued, Helena C. Kirby and George Kirby, with the intention of defrauding complainant and other creditors of George Kirby out of their just demands, conveyed said premises to said William Mühlenfeld for the consideration of \$10, and that on the same day said Mühlenfeld conveyed the premises for a like consideration to said Helena C. Kirby. The bill prayed, inter alia, that as to the complainant said conveyances be set aside and declared null and void. The defendants, George Kirby and Helena C. Kirby, filed their joint and several answer, denying that complainant was entitled to the relief sought, and subsequently the case

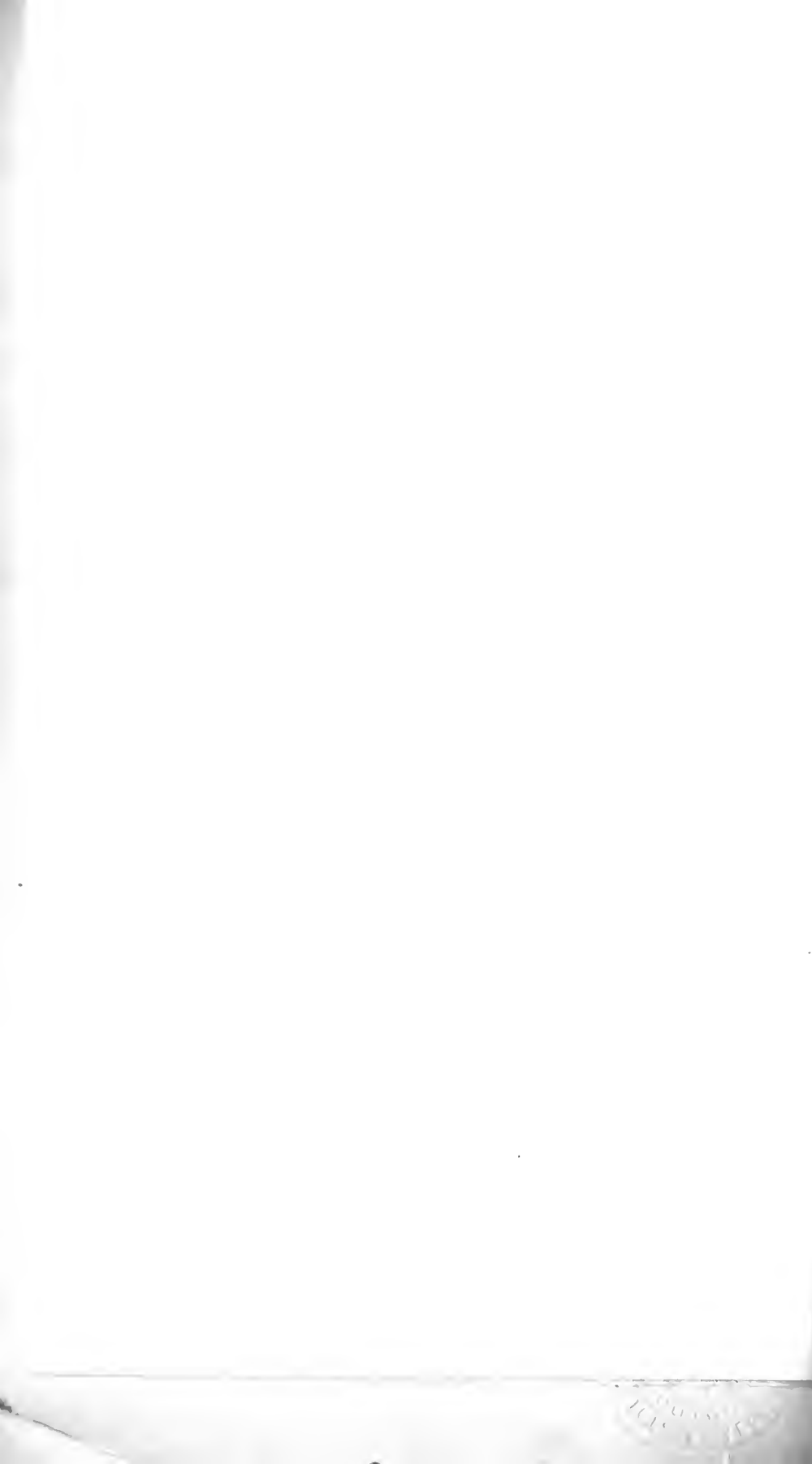




was heard by the chancellor in open court, resulting in the entry of a decree dismissing the bill for want of equity, from which decree this appeal is prosecuted.

It appears that on January 4, 1911, the defendant, Helena C. Kirby (then Helena C. Adamick) was married to said defendant, George Kirby, that at the time of said marriage she was the owner in her own right of cash and securities of the value of more than \$10,000; that in May, 1911, she purchased the premises in question, paying therefor with her own money the sum of \$8000 in cash and assuming an existing mortgage thereon of \$10,000; that at the earnest solicitation of George Kirby she deeded to said premises was made to Helena C. Kirby and George Kirby, as joint tenants; that on February 7, 1912, Helena C. Kirby insisted that, as the property belonged to her, she be given the exclusive legal title therein, and that on said date the deeds to Mühlenfeld and from Mühlenfeld to her were executed and recorded.

We have reviewed the evidence heard by the chancellor, as contained in the transcript before us, and are of the opinion that the court was fully warranted in dismissing the bill for want of equity. The conveyances of February 7, 1912, which are sought to be set aside as being fraudulent as to complainant, were made more than nine months prior to the date that complainant obtained his judgment against George Kirby. Mrs. Kirby testified that she first learned of complainant's judgment against her husband shortly after its rendition, and that the first she knew "about Mr. Kirby owing Mr. Butler anything, was about the first of May, 1912, when a colored man came with some papers for Mr. Kirby." And in the entire record we fail to find any indications of fraud on the part of Mrs. Kirby, or anything said or done by her inviting complainant to trust Mr.

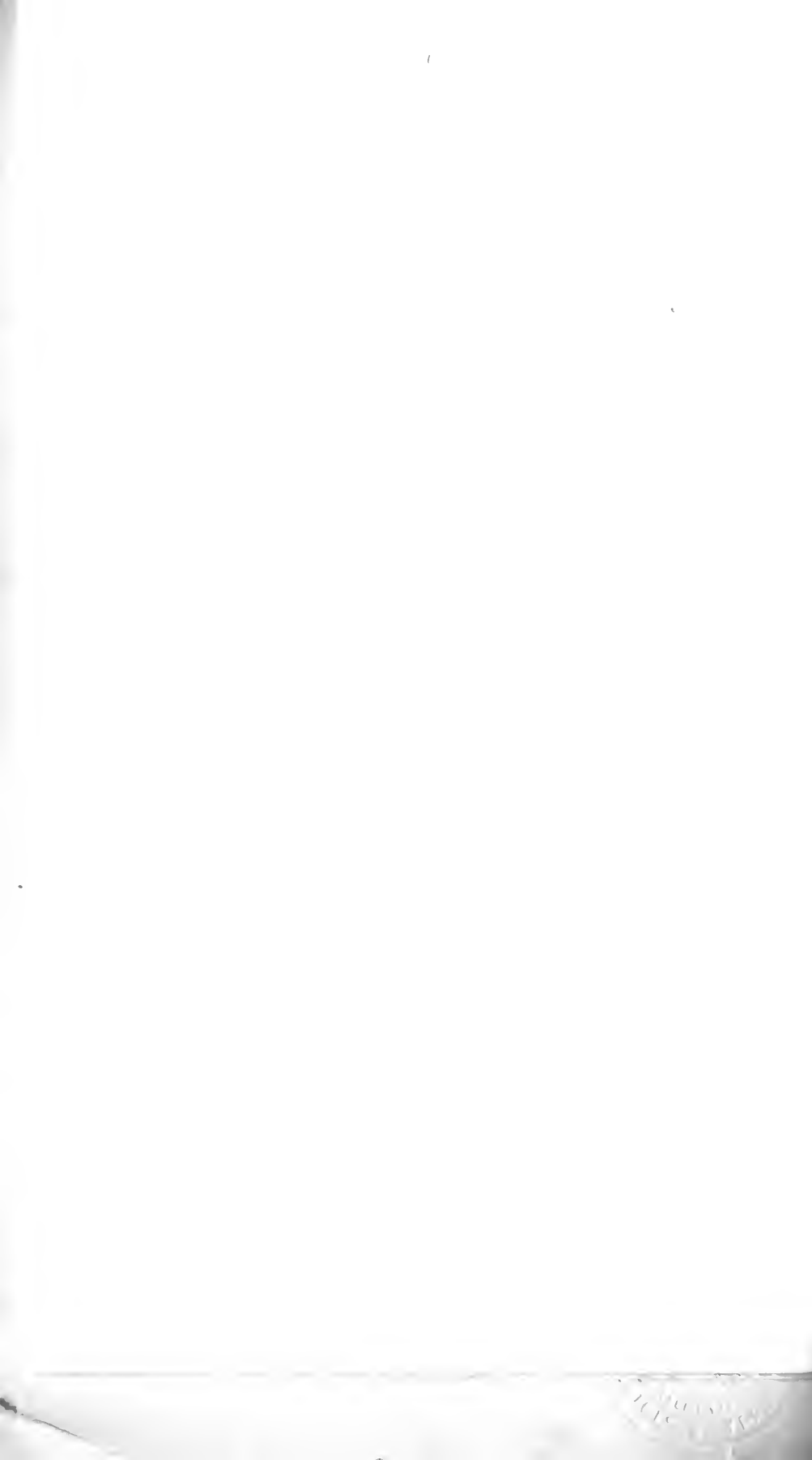


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Kirby upon the supposition that he had any interest in the premises in question. As said in Seeders v. Allen, 88 Ill. 468, 471: "She was in equity the owner, and her equitable title was by these deeds properly converted into a legal title, and this before any lien was established against the legal title in the hands of her husband. Her equity was first in time, and therefore first in right, and was first consummated. . . . The land was equitably her own, and as between her and creditors of her husband she was equitably entitled to it."

The decree of the Circuit Court is affirmed.

AFFIRMED.



426 - 18829

HENRY FRIEDMAN,

Appellee,

vs.

NORTHWESTERN TERRA COTTA

CO., a corporation,

Appellant.

Appeal from  
Circuit Court,  
Cook County.

108 T.A. 483

STATEMENT OF THE CASE. This is an appeal from a judgment for \$38,836.14, rendered in an action of account by the Circuit Court of Cook County, in favor of Henry Friedman, plaintiff, against Northwestern Terra Cotta Co., a corporation, defendant.

Plaintiff's declaration consisted of the common counts and two special counts, to which the defendant filed a plea of the general issue. The first special count alleged, in substance, that on January 1, 1911, the defendant was in the business of manufacturing and selling terra cotta for building and construction purposes in the city of Chicago; that the defendant then and there made a contract with plaintiff whereby plaintiff agreed to work for defendant, take charge of its cost-keeping and estimating department and devote all of his time and energy in securing contracts for the sale of terra cotta products; that for said services defendant agreed to pay plaintiff the sum of \$5,000 for the year ending December 31, 1911, and the further sum of 4% "commission" upon all sales of said terra cotta products that plaintiff might make during said year; that plaintiff faithfully performed his part of the contract and during said year secured for defendant from diverse persons and corporations contracts for the sale of, and sold, large amounts of said products, to-wit: \$1,000,000 worth; that on January 1, 1912, plaintiff became entitled to the sum of \$40,000, as "commission" on said sales, in addition to said sum of \$5,000; that the defendant paid to plaintiff the total sum of



\$5,302.86, and that there remains due and owing to plaintiff the sum of \$39,697.14, which sum defendant has not paid and still refuses to pay, to the damage of plaintiff, etc. The second special count is substantially the same as the first, save that it enumerates in detail the names of the parties and the contract price in each of the several contracts which plaintiff alleges he made for the defendant during said year.

The case was tried before a jury. Only three witnesses were sworn and examined, - the plaintiff, and the president, Guatav Hottinger, and the vice-president, Fritz Wagner, of the defendant corporation. The facts as disclosed from the testimony of said witnesses are substantially as follows: The defendant corporation is engaged in the city of Chicago, and it and its predecessors have there been engaged for over thirty years, in the business of manufacturing and selling terra cotta and terra cotta products for building purposes. Plaintiff entered the employ of defendant's predecessor in 1885, and continued in defendant's employ until January 15, 1912, when he resigned his position. From 1885 on he had charge of the cost-keeping and estimating department of defendant's business, and from 1902 he received a salary of \$5,000 per year. Since 1907, the business of defendant has been managed by the vice-president, Wagner, in consultation with the president, Hottinger, except when Wagner was absent on a vacation, at which times Hottinger acted as manager. The defendant had soliciting agents in many cities of the central and western states who received a certain commission on contracts procured by them, and when there was competition and the agent succeeded in getting the customer to give a preference to the defendant he received a larger commission. Usually no soliciting agents were employed in Chicago, and when Chicago architects or contractors desired terra cotta work to be made for buildings in Chicago or elsewhere they would generally write or telephone defendant asking for bids, and from the





records kept in the estimating department Wagner, or in his absence Hottinger, would name a price for which defendant would do the work desired. In the year 1910 plaintiff requested that he become a stockholder and officer of the company, but he did not ask for an increase in salary. Wagner, in reply, did not make any definite promise as to plaintiff becoming a stockholder and officer, but said he would at the end of the year (1910) figure out and pay to plaintiff and others, as a bonus, a "percentage of the profits" of the business, if any. Wagner did not, however, state what that percentage would be. During the year 1910 the defendant permitted plaintiff to draw against his salary as he might elect, and in the month of October plaintiff had drawn out all of his \$5,000 salary for that year. In December, 1910, plaintiff asked Wagner if there was enough coming to him so that he might have \$2,500, and Wagner, after consulting Hottinger, gave plaintiff his (Wagner's) personal check for \$2,500. Early in 1911, after the profits for the year 1910 had been ascertained, Wagner and Hottinger agreed upon the percentage which they would allow to plaintiff and certain other employees. Plaintiff, however, was not informed what that percentage was. The defendant company turned over to Wagner the entire amount to be distributed to said employees, and Wagner deposited the same in his own bank account and gave his personal check to the several employees. The amount so turned over to Wagner was charged on defendant's books as "commissions." This method of procedure appears to have been for the purpose of withholding all knowledge of the payment of any percentage to said employees from other employees. The amount coming to plaintiff was figured at \$4,196.24, and Wagner gave plaintiff his personal check, dated March 9, 1911, for said amount less \$2,500, viz: \$1,696.24, which check plaintiff accepted. During the latter part of the year 1910, and during the year 1911, the competition in the terra cotta business in Chicago had become much keener than



As to the facts as above outlined there appears to be no substantial dispute. The real issue in the case is whether the defendant verbally contracted to give plaintiff, for his services during the year 1911, in addition to his salary of \$5,000, a certain "commission" on sales made by him, or a "percentage of the profits" of the business, as a bonus. And on this issue the testimony is conflicting. Plaintiff testified, in substance, that in October, 1910, Wagner informed him that a certain competitor from the East had entered the Chicago market and was cutting prices, and instructed him to go out and get the work away from said competitor, and told him that prices would not cut any figure and that plaintiff would get "as good commissions as any other agent"; that other agents working outside of the city of Chicago received a commission of 5% on contracts procured up to \$5,000, and 3% on the excess; that plaintiff during the months of October, November and December, 1910, was instrumental in closing several contracts, aggregating about \$200,000, for work to be done on buildings to be erected in the year 1911; that during 1911 he was instrumental in closing contracts for work aggregating practically \$1,000,000; that during that year he several times protested to Wagner at the low prices at which work was being taken, and that at each time Wagner told him to go ahead and get the work and that the fact of the low prices would not militate against plaintiff receiving his commissions; and that he resigned his position in January, 1912, because of the refusal of defendant to give him a stock interest and elect him an officer of the company. Both Wagner and Hottinger denied that they had at any time agreed to give plaintiff, in addition to his salary, any "commission" on contracts which plaintiff might be instrumental in securing. Wagner testified that occasionally, prior to October, 1910, plaintiff had been sent out to assist in securing contracts; that afterwards he was sent out more frequently; that when sent out he was instructed by



Wagner as to what prices he should make; and that he was not permitted to solicit work or submit bids on his own initiative.

The letter of December 30, 1912, above referred to and which was refused admission on the ground that it was an offer to compromise, is as follows:

"Mr. Henry Friedman has called on me in relation to a claim for bonus promised him on contracts closed by him for your company during the year 1911. It is Mr. Friedman's contention that although a bonus was promised him based on earnings on contracts secured by him, that after he resigned his connection with your company that you advised him that the company had made no money during 1911, and consequently a very nominal bonus was paid. During the year 1910 when Mr. Friedman succeeded in closing only a few contracts a considerable bonus was paid to him, and consequently he continued during 1911 with your company and redoubled his efforts, anticipating a fair remuneration for the same. Your president, Mr. Hottinger, also held out hopes to Mr. Friedman that he would be more closely associated with your company in an official capacity and would be liberally rewarded at the end of the year on certain good contracts closed in which Mr. Friedman succeeded in obtaining preference and by helping to eliminate from this field certain other contracting companies.

"Is it not possible to amicably adjust this matter without filing a bill in chancery to compel an accounting? Kindly advise me.

Yours very truly,  
GEO. D. WELLINGTON."

When the jury retired to consider their verdict on the afternoon of June 3, 1913, the attorneys for the respective parties agreed that they might seal their verdict and separate until the usual hour on the following morning. When the court convened, as appears from the bill of exceptions, the foreman of the jury handed in the verdict and stated that the jurors could not remember the exact amount of plaintiff's claim, and, in order not to make a mistake, they had returned a verdict "for the full amount of plaintiff's claim," whereupon the court instructed the clerk to read the verdict, which was aired by all jurors and which was as follows: "We, the jury, find the issues for the plaintiff, and assess plaintiff's damages at the sum of, full amount of claim, ..... dollars." After considerable discussion, indulged in by the attorneys and the court in the presence of the jury, the court, over the objection and exception of the defendant, gave to



the jury the following instruction:

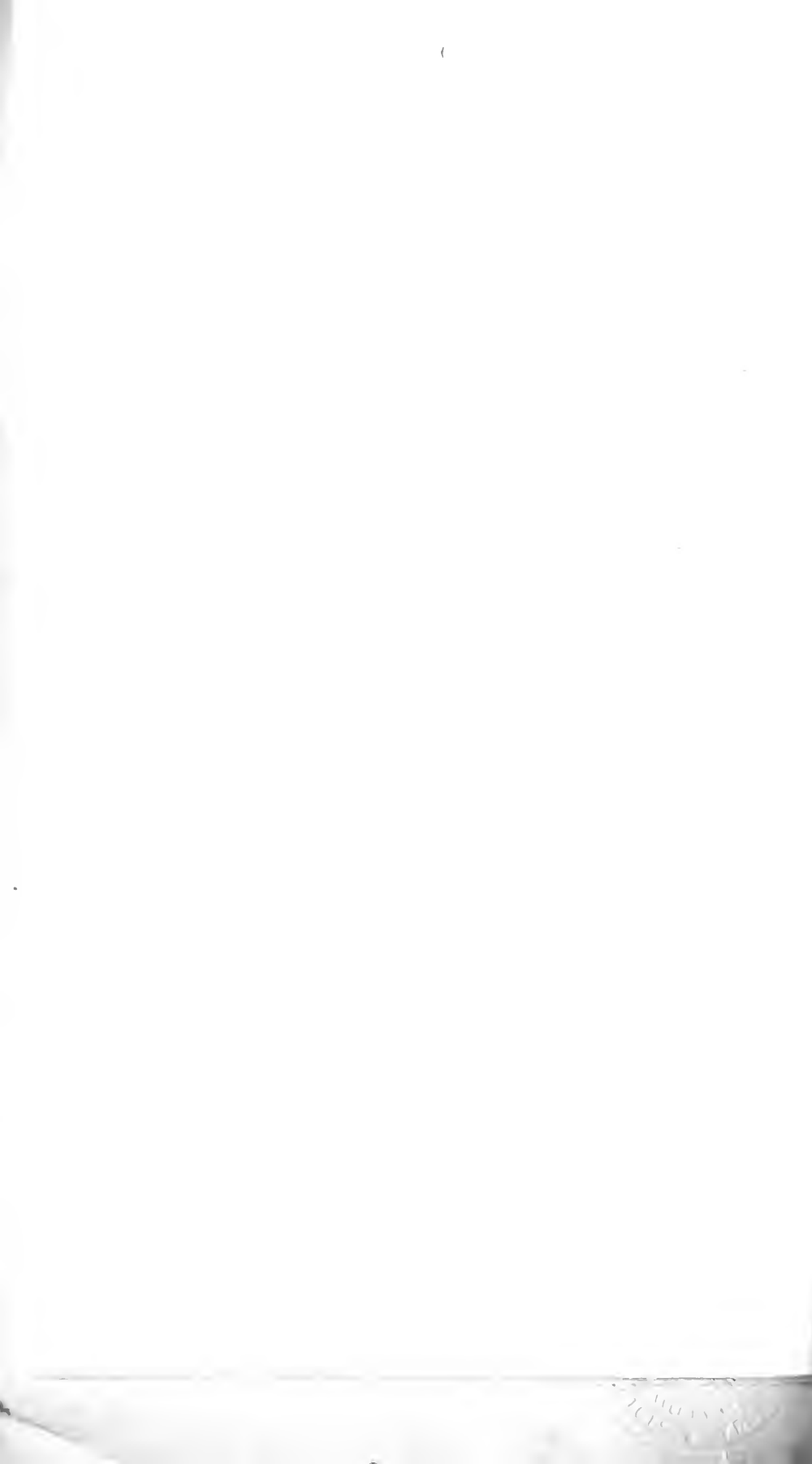
"The court instructs the jury that the amount claimed by the plaintiff as due from him, the defendant, is \$36,536.14, and it is claimed by the defendant that neither said sum nor any part thereof is due the plaintiff from the defendant. By the giving of this instruction the court does not intimate or wish to be understood as giving any opinion one way or the other as to whether the plaintiff is entitled to an allowance of said amount claimed or any other amount from the defendant, or that there is or is not due to the plaintiff any amount from the defendant, or that you should find the issues joined in favor of the plaintiff or in favor of the defendant. It is solely and exclusively for the jury to determine the facts, and this they must do from the evidence, and having done so, then apply to the facts the law as stated in the instructions of the court."

The jury again retired and subsequently returned a verdict, as follows: "We, the jury, find the issues for the plaintiff and assess plaintiff's damages at the sum of \$36,536.14," to the receipt of which verdict by the court the defendant objected and moved for a new trial, which motion the court denied and entered judgment on the verdict.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Counsel for defendant urge in this court that the judgment should be reversed because (1) the verdict is manifestly against the preponderance of the evidence, (2) the court erred in refusing to admit in evidence the letter, dated December 30, 1918, written to defendant by Mr. Wellington, the attorney for plaintiff, and (3) the court erred in giving to the jury the instruction mentioned in the foregoing statement of the case. Inasmuch as we have reached the conclusion that the judgment should be reversed and a new trial had, we will not express any opinion as to counsel's first point.

As to the letter, we are of the opinion that the trial court erred in refusing to admit the same in evidence. It appears that plaintiff, after advising his attorney, Mr. Wellington, of





the facts regarding his claim against defendant, expressly authorized the writing of the letter, and it was offered in evidence by defendant as tending to impeach certain of the statements of plaintiff made upon the stand to the effect that defendant had verbally agreed to give him certain commissions on sales, as distinguished from a certain bonus on the earnings of defendant. The court refused to admit the letter on the ground that it "has to do with a compromise and a settlement." We think that under all the facts and circumstances the court's refusal constituted error prejudicial to the defendant. And we do not think that the letter was inadmissible on the ground stated. The last paragraph of the letter was a mere suggestion that possibly there might be an amicable adjustment of plaintiff's claim. It contained no offer to compromise, and no statement that plaintiff would be willing to make any concession. In *Thompson v. Austin*, 2 Bowl. & Ryland 308, 360, it is said: "The essence of an offer to compromise is, that the party making that offer is willing to submit to a sacrifice, and to make a concession." In 1 *Greenleaf on Evidence*, sec. 197, it is said: "In order to exclude distinct admissions of facts, it must appear either that they were expressly made without prejudice, or, at least, that they were made under the faith of a pending treaty, and into which the party might have been led by the confidence of a compromise taking place." (See also *Hartford Bridge Co. v. Granger*, 4 Conn. 142, 148.)

In view of the foregoing it will be unnecessary for us to express an opinion on the third point urged by counsel for defendant. The situation will doubtless not arise on another trial.

For the reasons indicated the judgment of the Circuit Court is reversed and the cause remanded.

REVERSED & REMANDED.

*[Faint handwritten notes]*

FREDERICK W. JOB and DUDLEY  
TAYLOR,  
Appellees,  
vs.  
HENRY M. WALLACE,  
Appellant.

Appeal from  
Municipal Court  
of Chicago.

188 I.A. 485

STATEMENT OF THE CASE. This is an appeal from a judgment for \$1,475, rendered by the Municipal Court of Chicago, in favor of Frederick W. Job and Dudley Taylor, plaintiffs, against Henry M. Wallace, defendant. The case was tried before a jury who returned a verdict finding the issues against the defendant and assessing plaintiffs' damages at \$1,600. The court required a remittitur on the verdict of \$125.

In plaintiffs' amended statement of claim it is alleged, in substance, that on or about January 3, 1899, at Chicago, the defendant employed plaintiffs to represent him as his attorneys in the matter of his relations with the Klondike-Yukon Copper River Mining Co., and the proposed formation by said defendant of a new company to carry on dredging work, gold mining, etc., along the rivers then controlled by said Klondike Co.; that it was then agreed that said legal services of plaintiffs would be rendered from time to time during a period of about 60 days thereafter; that defendant agreed to pay plaintiffs for said services in accordance with the terms of a certain written agreement (thereto attached and made a part of said statement of claim); that plaintiffs represented defendant in the matter of his relations with said Klondike Co., endeavored to procure an adjustment of said relations and a settlement of the claim of defendant against said Klondike Co., instituted suits at law and in equity in behalf of defendant against said Klondike Co. and certain of its officers,



appeared for and represented defendant in a suit instituted against him by said Klondike Co., rendered other legal services to defendant in relation to said suits and the matters in controversy, and fully complied with the terms of their employment during more than 60 days after January 3, 1899, and for a long time thereafter and until about March 17, 1900; that plaintiffs were able and willing to render services as to the proposed formation of said new company but said defendant decided not to form said new company and did not require plaintiffs' services in relation thereto; that defendant did not pay plaintiffs \$100 or \$1,000, and did not deliver to them \$1,000 par value of capital stock, all as provided in said agreement; that defendant has not paid them any part of said \$1,000, or delivered to them any capital stock, in payment for their said services, and that there is now due them from defendant the sum of \$1,000, with interest at 5% per annum from January 3, 1901.

The written agreement mentioned is as follows:

"Chicago, January 3, 1899.

H. K. Wallace, Esq.,  
Chicago, Ill.

Dear Sir:-

Referring to our consultation with you Saturday and today regarding legal services to be performed by us in the matter of your relations with the Klondike-Yukon Copper River Mining Co., and the proposed formation by you of a new company to carry on dredging work, gold mining, etc., in and along the rivers now being controlled by said Klondike Co., and referring to the matter of payment for legal services to be rendered you by us, we would say:

You are to pay us \$100 in cash at the time a certain One Thousand (\$1000) Dollars now contemplated to be collected by you is collected from Mr. and Mrs. D. Hunt of Ann Arbor; in any event said \$100 to be paid not later than 60 days from today, and also to give us on account of our services \$1000 par value of the capital stock of the new Klondike Mining Corporation, contemplated to be incorporated by you under the laws of West Virginia, as soon as may be expedient after or during the settlement of your differences with the first above named corporation; in any event said \$1000 par value of capital stock is to be delivered by you to us on or before two years from this date; you are to further guarantee and do hereby guarantee to us that within two years from this day you will purchase from and pay us for said \$1000 capital stock, the sum of \$1000 (less the \$100 heretofore mentioned) and we agree that at any time after the delivery to us of said stock, and before two years from today, you shall have the privilege of purchasing said \$1000 capital stock from us for the sum of \$1000. In the event that



said new corporation is not formed by you, or said stock is not delivered to us by you, you are to and do hereby agree to pay us the sum of \$1000 in cash (less the said sum of \$100 hereinbefore mentioned when the same is paid) on or before two years from this date.

Said sum of \$100 and said \$1000 capital stock so guaranteed by you is to be for services rendered by us as aforesaid; if no unusual amount of legal services are rendered by us in the matter of adjusting your differences with the first above named corporation, or the attack upon the same by a stockholder who is friendly to your interests, then said sum of \$100, and said capital stock so guaranteed by you, or the cash in lieu thereof, shall be and become a full settlement of our services rendered.

If, however, any unusual amount of work is necessary or becomes necessary to be done by us in and about said matters, then we are to have the right to make a further charge to you for said services.

You are to furnish all moneys that may be or become necessary to cover actual costs and disbursements paid out and expended in and about the legal work contemplated herein.

You are to and do hereby agree to protect and indemnify us against any assessments or legal liability of any sort whatever that may be made upon or against the said \$1000 capital stock to be given us by you.

DUDLEY TAYLOR  
F. W. JOE

The terms of this Agreement accepted this Third day of January A. D. 1892.

H. M. WALLACE."

In defendant's affidavit of merits the nature of his defense was stated, as follows:

"That the plaintiffs agreed to file a bill for a receiver and to take the necessary steps to show the insolvency of the Klondike-Yukon Mining Co., and secure an adjudication winding up the affairs of said company within a period of thirty or sixty days. It was agreed by the plaintiffs to give precedence to this work over all other work in their office, that time was the essence of the contract; that the plaintiffs failed to take the necessary evidence for the securing of the proper orders; that they refused to give the matter the necessary attention, refused to give it precedence over matters in their office, failed to bring or to use reasonable effort to bring the matter to a final adjudication within sixty days as agreed; refused to appear in court or before master in chancery unless paid in advance for such appearance; that the bill filed by them was demurred to and they neglected to call up and dispose of said demurrer and finally dismissed their bill without securing any adjudication in the suit; that the plaintiffs wholly failed to perform their agreements and by reason thereof this defendant was put to great expense and loss of money and profit."

On the trial each of the plaintiffs was examined and cross-examined at length, and the agreement of January 3, 1892, sued on, was introduced. At the conclusion of plaintiffs' evidence the court denied the motion of the defendant for a directed





verdict. The defendant was the only witness in his own behalf. Certain letters and documents were also introduced. In rebuttal each of the plaintiffs again testified, and other letters were offered and received in evidence. At the close of all the evidence the motion of defendant for a directed verdict was renewed and again denied. The court instructed the jury orally.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is first contended by counsel for defendant that the motions for a directed verdict for the defendant, made at the close of plaintiffs' evidence and again at the close of all the evidence, should have been allowed, (1) because the evidence showed that plaintiffs repudiated their contract and abandoned their retainer, and were therefore entitled to recover, if anything, only the reasonable value of the services rendered, and (2) because the evidence showed that the contract upon which plaintiffs sued had for its consideration their agreement to commence groundless suits, which contract was contrary to public policy and void. After a careful examination of the transcript before us we cannot say that the evidence showed that plaintiffs repudiated their contract, or that the contract sued on had for its consideration the agreement of plaintiffs to commence groundless suits on behalf of defendant. Nor do we think that the verdict is manifestly against the weight of the evidence, as urged by counsel. In our opinion, the evidence tended to prove all of the allegations of plaintiffs' amended statement of claim.

It is also contended by counsel that error, prejudicial to the defendant, was committed by the court in certain portions of the oral charge to the jury and in the refusal to give to the jury certain written instructions offered by defendant. It is



argued that the court in effect told the jury that they could not consider what was said by the parties prior to the date of the contract of January 3, 1899, for the purpose of supplementing said contract. While it is true that the court in a somewhat lengthy charge told the jury that the terms of a written contract could not be changed by oral evidence, we do not think that the jury were misled. The court allowed both the plaintiffs and defendant to testify fully as to the conversations had between the parties prior to the signing of the contract. Furthermore, no specific objection was made to this portion of the charge by the defendant at the time. (Pecararo v. Halberg, 246 Ill. 95.) It is also argued that the court erred in charging the jury that if they found for the plaintiffs they should find plaintiffs' damages at the sum of \$1,000, together with interest. We do not think that under the pleadings and the evidence the court erred in this portion of the charge. The suit was upon a specific contract. No attempt was made to recover upon a quantum meruit. Furthermore, no specific objection was made to this portion of the charge. As to the written instructions offered by the defendant and which the court refused to give, we are of the opinion that they were all properly refused. Several of them assumed as facts matters controverted by the evidence; others were misleading. Furthermore, it has been decided that, where a Municipal Court judge elects to instruct the jury orally, it is not error to refuse to give offered written instructions, even if they are correct and applicable to the facts of the case. (Morton v. Fusey, 237 Ill. 36; Hakea v. B. Aaron & Sons, 182 Ill.App. 100, 104.)

And we do not think that the trial court, in the rulings on evidence or in certain questions asked of the defendant, committed any errors warranting a reversal of the judgment.

Finding no reversible error in the record the judgment of the Municipal Court is affirmed.

AFFIRMED.



CHARLES M. HOVEY,

Appellee,

vs.

D. A. MATTESON,

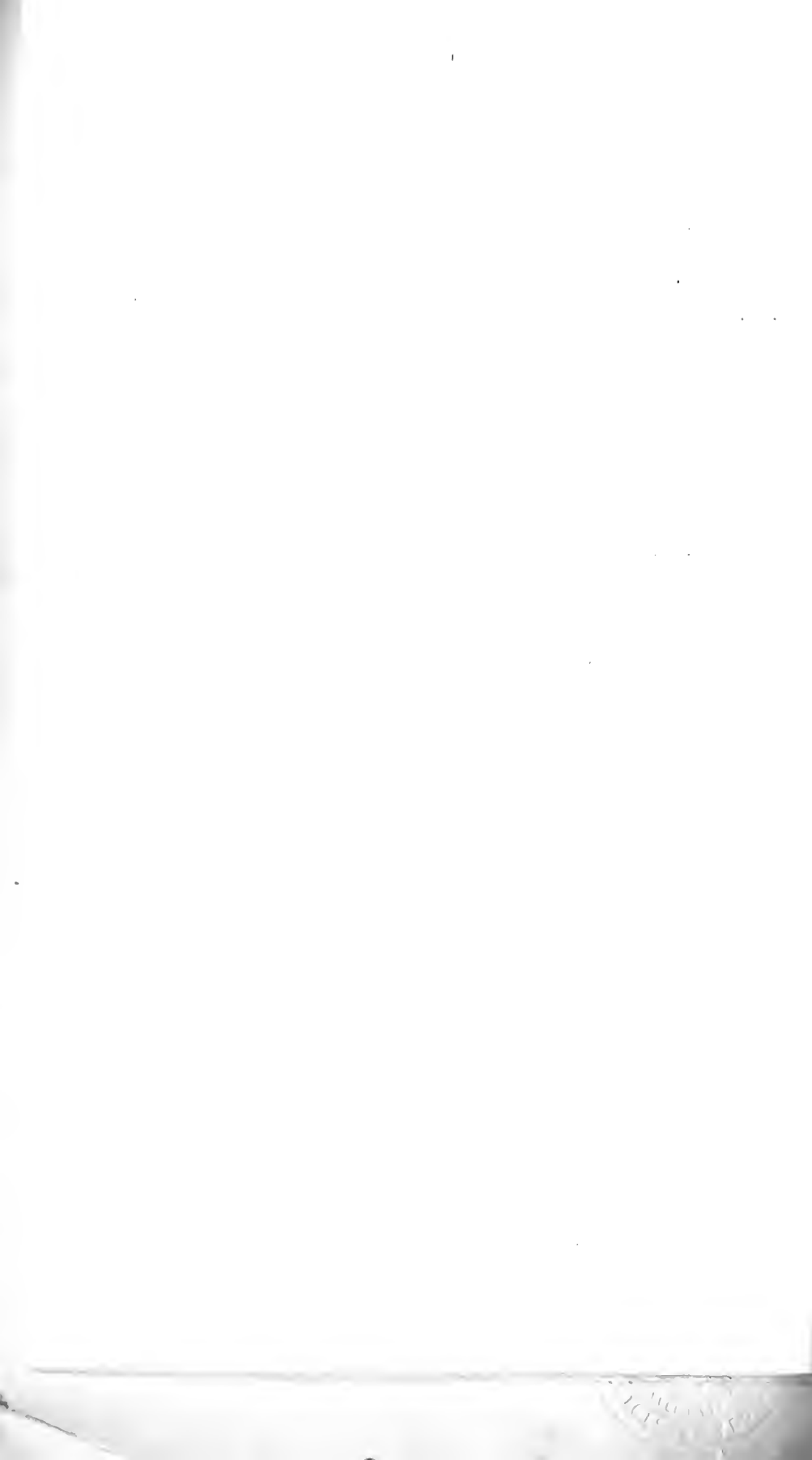
Appellant.

Appeal from  
Municipal Court  
of Chicago.

188 I.A. 486

STATEMENT OF THE CASE. This is an appeal from a judgment for \$1,183, entered upon the verdict of a jury by the Municipal Court of Chicago in favor of Charles M. Hovey, plaintiff, and against D. A. Matteson, defendant. Plaintiff sued for commissions claimed to be due him as a licensed real estate broker on the sale of a certain 15-flat building situated in the city of Chicago and owned by defendant. In his statement of claim plaintiff alleged, in substance, that on July 15, 1912, the defendant "listed" said building with plaintiff and "agreed thereby to pay the customary commission" in case plaintiff found a customer; that such customary commission is  $2\frac{1}{2}$  per cent.; that plaintiff found a customer, one Emanuel Leavitt, who purchased the property at the price of \$47,500, and that, therefore, plaintiff claimed a commission of  $2\frac{1}{2}$  per cent. on the amount the property sold for. In defendant's affidavit of merite it was alleged, in substance, that plaintiff did not procure said Leavitt as a customer for defendant's building; that said building was exchanged for another building owned by said Leavitt, which latter building was of a value much less than \$47,500; that another real estate broker, named Gripp, was the procuring cause of such exchange, and that plaintiff at the time was acting as a broker for said Leavitt.

It appears from the evidence that in April or May, 1912, the defendant saw C. A. E. Gripp, a licensed real estate broker, and informed him that he expected to soon acquire title to a certain



15-flat building in the city of Chicago, and requested Gripp to endeavor to sell or exchange the same. Subsequently, in July, 1912, defendant obtained a contract for the sale to him of said building, and about July 15th he met the plaintiff for the first time and also requested the latter to endeavor to sell or exchange said building. At this interview defendant mentioned \$55,000 as the price for said building, but nothing was said regarding commissions. Subsequently, on July 29th, defendant received a deed to the building. Some time in June, 1912, Emanuel Leavitt listed his 9-flat building, on South Spaulding avenue, Chicago, with the plaintiff for sale or exchange. Later in the same month Leavitt also listed said 9-flat building with Gripp. On July 25th plaintiff wrote defendant to the effect that a party named Emanuel Leavitt was the owner of a 9-flat building and that he desired to trade his building for a larger flat building, being willing to pay the difference in price in cash. At this time plaintiff had an agreement with Leavitt that if plaintiff succeeded in selling or exchanging the Leavitt building he was to be paid the regular commission. Plaintiff, however, did not advise defendant of this fact, nor did he mention Leavitt's address or the location of said building. About August 3rd defendant telephoned plaintiff saying he had received plaintiff's letter of July 25th, and that if plaintiff thought that the party mentioned would be interested in a trade to get a proposition from him. In the meantime Gripp had noticed in a newspaper that defendant had acquired title to said 15-flat building, and about August 1st or 2nd he communicated with defendant, and the latter again told Gripp to endeavor to sell or exchange said building. On Sunday, August 4th, Gripp called at Leavitt's residence, met Leavitt and the latter's son, and submitted defendant's building to Leavitt, and on the same day telephoned defendant's residence and left a message with defendant's wife, which message defendant received that evening, to the effect that





he had a building on South Spaulding avenue which he wanted defendant to look at, and requested that defendant call at Gripp's office on the following morning. After Gripp had called at the Leavitt residence, Leavitt's son, Richard, on the same day called on plaintiff and asked if there was "anything new," and plaintiff stated that he was "getting a line" on defendant's building (giving its location), which he thought might be traded for the Leavitt building, to which Richard replied that that building had already been submitted by Gripp. After this interview and on the same day plaintiff wrote defendant a letter, dated August 4th, in which he for the first time gave defendant the location of the Leavitt building. The envelope containing this letter was postmarked "Aug. 5, 1.30 A. M." In this letter plaintiff wrote, in substance, that a man named Gripp had submitted defendant's building to his "client," Leavitt; that because he had only yesterday received defendant's reply by telephone to his (plaintiff's) letter of July 25th, he had not been able to previously present defendant's building to Leavitt, that "in case the other gentleman should see you or communicate with you, you will of course tell him that I had taken this matter up some time before he did," and that he hoped defendant would examine the Leavitt building immediately. On the morning of August 5th defendant called at Gripp's office and Gripp gave him the location of the Leavitt building and defendant went and examined the building, met Mrs. Leavitt, wife of Emanuel Leavitt, and then called on plaintiff. Defendant testified, in substance, that at this interview he told plaintiff that he had examined the Leavitt building; that another broker, Gripp, had first submitted the building to him; that Mrs. Leavitt had told him that the Leavitts would not deal with plaintiff because Gripp had submitted defendant's building to them first; that plaintiff then asked defendant if defendant would not give him a proposition for a trade which he (plaintiff) could submit to Leavitt; that defendant replied that



he would do so and that he would also give the same proposition to Gripp and that whichever of them consummated the trade would be paid a commission; that the proposition was that he wanted \$15,000 and the Leavitt building for his (defendant's) equity in the 15-flat building; that defendant then went again to Gripp's office and made the same statement to him; that about a week thereafter defendant telephoned plaintiff and asked him what he had done with Leavitt, that plaintiff replied he had submitted defendant's proposition to Leavitt but that Leavitt had said that defendant wanted too much money for his building and that he (plaintiff) could not get a counter proposition from Leavitt; that he (defendant) did not again hear from plaintiff until after the contract of August 22nd was signed; and that when the deeds were subsequently passed defendant paid Gripp \$800 as a commission and that Leavitt also paid Gripp \$300 as a commission.

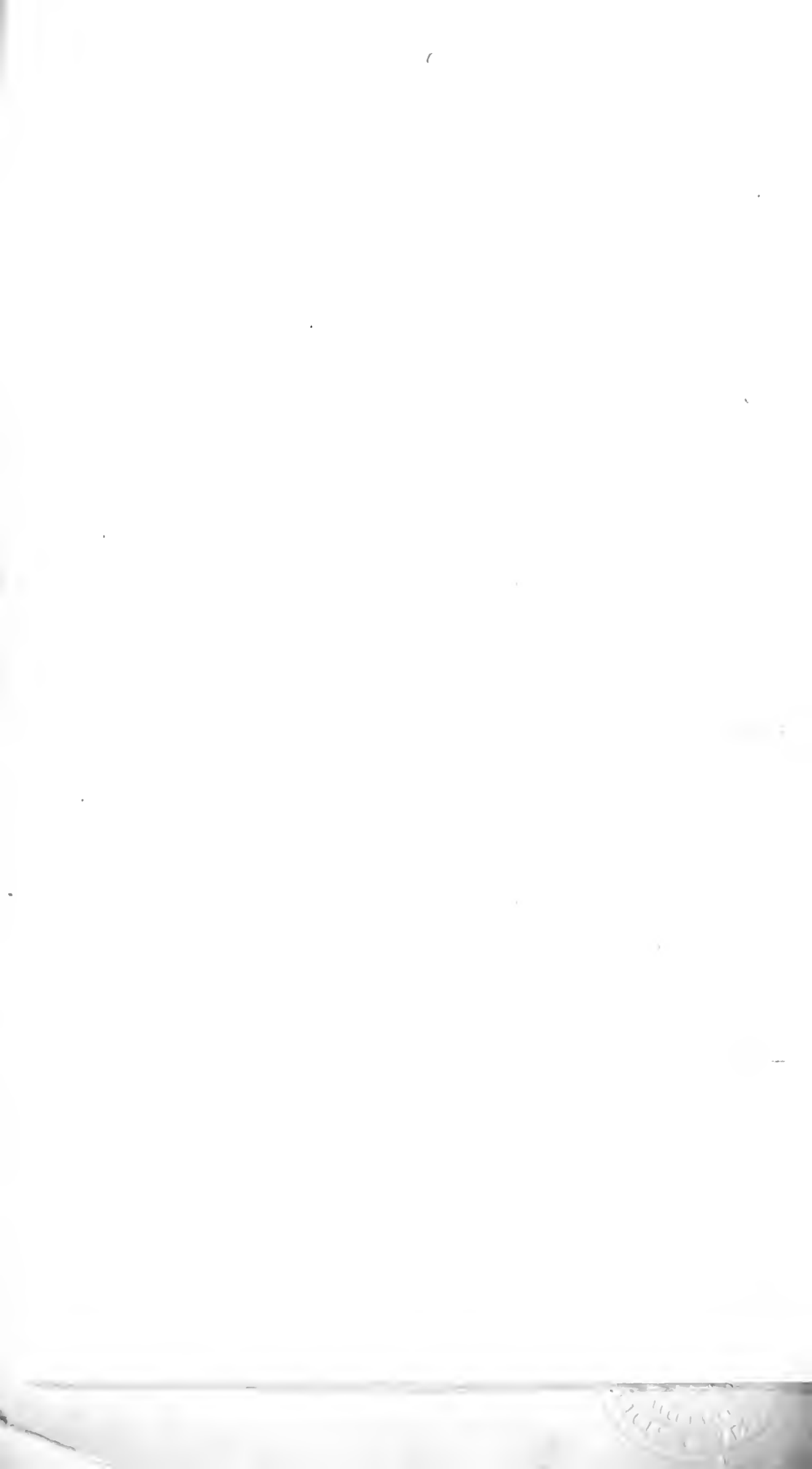
Gripp testified, in substance, that defendant called at his office twice on August 5th; that on the second call and after defendant had examined the Leavitt building defendant told him to submit a proposition to Leavitt that he would trade his building for the Leavitt building and \$15,000; that Gripp told him that he thought the price a little high but that he would see what Leavitt would be willing to do; that on August 7th or 8th, at his solicitation Leavitt and defendant met in his (Gripp's) office and various propositions, back and forth, looking to a trade were made but no agreement was arrived at; and that subsequently he had various interviews with both Leavitt and defendant, which finally resulted in their entering into a contract, on August 22nd, for the exchange of their respective buildings.

This contract was introduced in evidence, and provided, in substance that Leavitt would pay to defendant \$5,725 and deed to defendant said 8-flat building, valued at \$25,000 and being unincumbered, in consideration of defendant and wife conveying to



Leavitt defendant's 15-flat building, valued at \$47,728 and on which there was a mortgage of \$17,000. The contract bore an endorsement over the signatures of the parties to the effect that said contract had been consummated on September 1, 1912, by the delivery of the deeds, payment of cash, etc.

The plaintiff, Hovey, testified that on Sunday, August 4th, after Richard Leavitt had called and advised him that Gripp had first submitted defendant's building to the Leavitts, he (plaintiff) tried to telephone defendant at the latter's residence, and later succeeded in telephoning him at his mother's residence; that he then informed defendant of Gripp having submitted defendant's building to the Leavitts, and that defendant replied to the effect that he (defendant) had told Gripp that he (Gripp) was too late as plaintiff had first submitted Leavitt's property to defendant; and that he (plaintiff) wrote the letter of August 4th to defendant after he had had this telephone conversation with the defendant. The defendant, Matteson, denied that he had any such telephone conversation with plaintiff or made any such statement to plaintiff. And in plaintiff's letter of August 4th there is contained the sentence, "I tried to get you on the telephone today, both at your house and at your mother's, but you were out, so I am writing you this letter." Plaintiff further testified, in substance, that after defendant had called at plaintiff's office, on August 5th, he did not see or communicate with either Leavitt or his son for three or four days; that then he saw Leavitt's son, Richard, and submitted to him defendant's proposition, viz: the Leavitt building and \$15,000 for defendant's building as incumbered; that Richard said the \$15,000 difference was too much, and that plaintiff so advised defendant by telephone, and that defendant suggested that plaintiff procure a counter proposition; that plaintiff again saw Richard and urged him to make a proposition, saying, "it is possible we can get him (defendant) down something from that," and that



he never got any proposition from the Leavitts.

While plaintiff was on the stand there was offered and received in evidence, over defendant's objection, a carbon copy of a letter, written by plaintiff to defendant on September 3rd, after the contract for the exchange of buildings had been signed and the deeds had in fact passed. Notice to produce the original was given and proof of mailing made. In this letter plaintiff stated that he had heard of the signing of said contract of August 22nd, gave a history of the dealings and relations of the parties as viewed by plaintiff, expressed surprise at the "clandestine" manner in which the negotiations between Gripp defendant and the Leavitts had been carried on, intimated that plaintiff was entitled to commissions on the deal and demanded an early interview.

At the conclusion of plaintiff's evidence and again at the conclusion of all the evidence defendant moved for a directed verdict in his favor, but the motions were denied.

The court delivered a somewhat lengthy oral charge to the jury in which the court stated, among other things, that "if you find the issues for the plaintiff your verdict must be for \$1,193," to which charge as to damages defendant objected. There was no evidence that when defendant listed his building with plaintiff, or at any time, defendant agreed to pay any definite sum as commissions in case plaintiff negotiated a sale or exchange. And there was no positive testimony as to the actual value of defendant's building. The only suggestion of any value was that contained in the contract of August 22nd, viz: that the parties agreed to exchange the buildings on the basis of trade values as follows: Leavitt agreed to convey his building, valued at \$25,000, and pay \$5,725 cash, in consideration of defendant conveying his building, valued at \$47,725 but subject to an incumbrance of \$17,000. The only testimony introduced as to the customary charges for commissions of brokers in Chicago in the year 1912 for selling or secur-



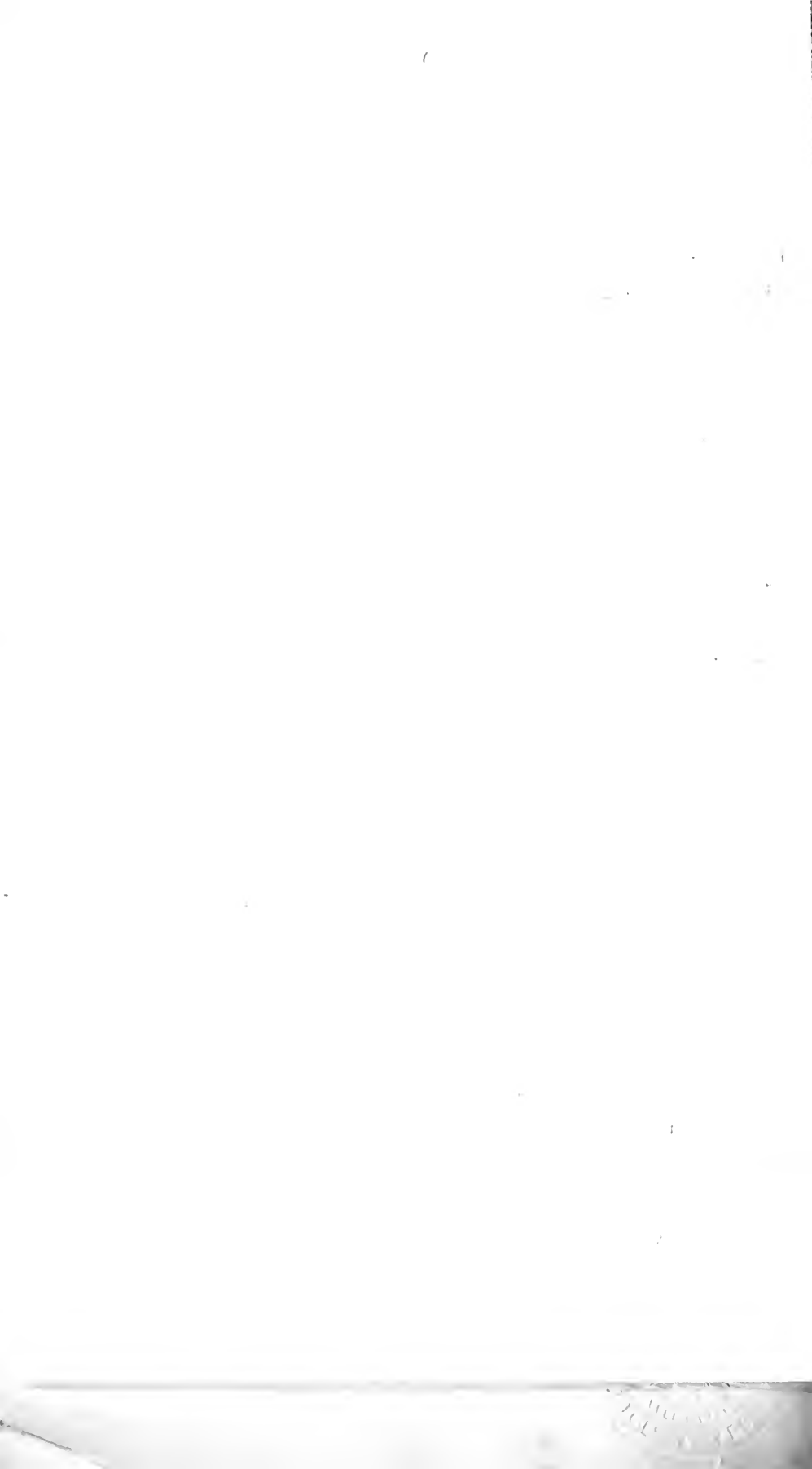


ing an exchange of real estate was that of the plaintiff, who testified that at the time and place such customary charge was  $2\frac{1}{2}$  per cent. He further testified that he had computed commissions at  $2\frac{1}{2}$  per cent. on a sale of \$47,720 and it amounted to \$1,193 and some cents.

MR. JUSTICE CRIDLEY DELIVERED THE OPINION OF THE COURT.

It is contended by counsel for the defendant that the court erred (1) in admitting plaintiff's letter to defendant of September 3, 1912, and (2) in charging the jury that if they found the issues for the plaintiff their verdict must be for the sum of \$1,193. It is further contended (3) that the judgment should be reversed with a finding of fact, on the ground that the evidence shows that Gripp, and not plaintiff, was the procuring cause whereby the exchange of said buildings was made by Leavitt and the defendant.

In the view we take of this case it is perhaps unnecessary for us to discuss the two points of counsel, first mentioned. We may, however, say that in our opinion plaintiff's letter of September 3rd should not have been admitted and that its admission tended to prejudice the jury in favor of plaintiff. The letter was written after the exchange of the buildings had been consummated and after the rights of plaintiff, if any he had, had become fixed, and it was a self-serving document and apparently written in preparation of making a claim against defendant for commissions. And, in our opinion, the trial court <sup>also</sup> erred in giving that portion of the charge to the jury as to damages, wherein the jury were instructed that if they found the issues for the plaintiff their verdict must be for \$1,193. The plaintiff testified that the cus-



tomary charges of brokers in Chicago for selling or exchanging real estate was  $2\frac{1}{2}$  per cent. and that  $2\frac{1}{2}$  per cent. on a sale of \$47,750 amounted to some cents more than \$1,193, but there was no testimony of the custom on what that rate was figured, whether on the actual or trade value of said real estate; and there was no testimony as to the custom when mortgaged property is exchanged, whether said rate is figured on the value of the property less the mortgage or not. The actual value of defendant's building was not shown. And the contract introduced in evidence discloses that the exchange was on the basis of certain trade values made by the parties to the contract, that the Leavitt building was valued at \$25,000, that the net value of defendant's building was figured at \$30,725, and that Leavitt was to pay defendant the difference, \$5,725, in cash. In 19 Cyc. 237, it is said: "In estimating the commission upon an exchange of real estate the actual and not the trade value of the property should be taken as the basis." And see Calland v. Trapet, 70 Ill. App. 228.

As to counsel's third point, we are of the opinion, after a careful examination of the transcript before us, that the evidence clearly shows that plaintiff was not the procuring cause whereby the agreement to exchange and the exchange of said buildings were made by Emanuel Leavitt and defendant. In Friend v. Triggs Company, 147 Ill. App. 427, 430, it is said, quoting from Day v. Porter, 161 Ill. 235, 237: "A broker, unless wrongfully prevented by his principal, must bring about an agreement in order to be entitled to his commission, and the principal may employ several brokers to sell the same property, and may sell to the buyer who is first procured by any of them, without being called upon to decide which of the brokers was the primary cause of the sale provided he remains neutral between them and is not guilty of any wrong." In this case the evidence shows that the defendant listed his 15-flat building for sale or exchange with both the



broker, Gripp, and the plaintiff; that Gripp first brought defendant's attention to the Leavitt building; and that Gripp, and not plaintiff, brought about the agreement of August 22, 1912. And the evidence does not tend to show that defendant did not remain neutral as between plaintiff and Gripp, or that defendant was guilty of any wrong to plaintiff, and, in our opinion, plaintiff failed to prove his claim against defendant for commissions.

The judgment of the Municipal Court, therefore, will be reversed with a finding of fact, and judgment will be entered here for the defendant.

REVERSED AND JUDGMENT HERE FOR THE DEFENDANT.

FINDING OF FACT. We find that the plaintiff, Charles M. Hovey, was not the procuring cause in bringing about the agreement for the sale or exchange of the building owned by the defendant, D. A. Matteson, to Emanuel Leavitt.



ber term, 1917.

461 - 19864

ABRAHAM LORENZE,  
Appellant,

vs.

FOUR WHEEL DRIVE AUTO COMPANY,  
Appellee,

)  
) Appeal from  
) Municipal Court  
) of Chicago.  
)

188 I.A. 488

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Abraham Lorenze, plaintiff, commenced an attachment suit in the Municipal Court of Chicago against Four Wheel Drive Auto Company, a corporation having its principal office in Clintonville, Wisconsin, defendant. Subsequently the defendant entered its general appearance. In the amended statement of claim it was stated that plaintiff's claim was for a balance of \$1,200, due him for commissions on account of the sale for defendant of 100 shares of its corporate stock to Mrs. M. E. Saville. In defendant's affidavit of merits it was stated that defendant was not indebted to plaintiff in any sum whatsoever, that plaintiff did not make a sale of said shares of stock on behalf of defendant, and that defendant never had any contractual relations with plaintiff as to the sale of said stock. The case was tried before the court without a jury, resulting in a finding and judgment for defendant, and plaintiff appealed to this court.

On October 22, 1912, the defendant entered into a written agreement with W. A. Olen, a resident of Clintonville, Wisconsin, and president of the defendant company. By the terms of said agreement it was provided that Olen should become the exclusive agent of defendant to sell its capital stock, and should have the privilege of selling 1,000 shares at not less than \$110 per share; and should receive a commission of \$15 for every share sold by him; that all applications for said stock should be taken on regular





blanks furnished by the company, one-half to be paid in cash and balance within 30 days; that Olen should receive his commissions as the stock was paid for; that he should have the right to appoint sub-agents to assist him in the sale of the stock; and that if he sold the amount of stock within the times provided in said agreement he should have the exclusive right to sell all the remaining stock, but that if he failed to do so the agreement might become void at the option of the company. Subsequently, on November 19, 1912, Olen, individually, entered into a written contract with the plaintiff, Lorenze, to which contract a copy of said agreement of October 22nd was attached and made a part thereof, and in which contract it was provided that plaintiff should have the exclusive right to sell stock, within a certain limited territory, in accordance with the terms of Olen's agreement with the company; that Olen should pay plaintiff a commission of \$15 for each share of stock sold by plaintiff, to be paid as soon as the stock was paid for; that Olen granted plaintiff the right to sell 500 shares upon condition that the latter should sell 35 shares on or before December 22, 1912, and 50 shares every thirty days thereafter; and that in case Olen's agreement with the company should become void this contract should likewise become void. Duplicate copies of this contract were executed, - plaintiff retaining one and Olen the other.

Plaintiff testified, in substance, that he did not sell 35 shares of stock by December 22, 1912, that early in January, 1913, he had a talk with Olen, the president, and with Frank Gause, secretary, of the defendant company, wherein it was verbally agreed that he should thereafter make sales of said stock on behalf of the defendant company and should receive the same rate of commission as provided for in his contract with Olen. Both Olen and Gause denied that any conversation to that effect was then or at any time had



with plaintiff, or that the defendant company ever entered into any such verbal agreement with plaintiff. Olen testified, in substance, that early in January, 1913, he had a conversation with plaintiff relative to the continuance of plaintiff's contract with Olen, and that at that time plaintiff requested that Olen make an endorsement on plaintiff's duplicate copy of said contract; that Olen did so, and that that endorsement was to the effect that Olen extended said contract as long as Olen's agreement with the defendant company remained in force and as long as any stock remained to be sold. Plaintiff denied that such endorsement was made on his copy of the contract, but he was unable to produce the same, saying that it had been mislaid and that he had made diligent search but could not find it. Olen's copy of said contract, which was introduced in evidence, did not bear any endorsement. It further appeared from the evidence that subsequent to January 1, 1913, plaintiff made several sales of stock to various parties and received his commissions therefor, - some remittances being made by checks of the defendant company, which checks were charged to Olen's account with the defendant company. Various letters written to plaintiff and signed "W. A. Olen," or "W. A. Olen, president," were introduced in evidence, as were also some of plaintiff's letters addressed to said Olen individually or as "president." On March 23, 1913, plaintiff wrote W. A. Olen, personally, as follows: "Apparently your stock deal with me is cleaned up - outside of my commission on the balance of Mrs. Saville's stock, and when can I expect a remittance for same?"

We cannot say that the finding and judgment are manifestly against the weight of the evidence, as contended by counsel for the plaintiff. It does not appear that the agreement between Olen and the defendant had been canceled. Nor does it sufficiently appear that plaintiff made a verbal agreement with defendant whereby the latter was to pay him commissions on stock sold by



him, or that defendant by its acts at any time recognized that it had any contractual relations with plaintiff. If plaintiff has not been paid all the commissions due him, his claim is against Olen personally and not defendant.

Neither do we think that the trial court committed any errors, prejudicial to the plaintiff, in its rulings on the admission of evidence, as also contended by counsel.

Accordingly, the judgment of the Municipal Court is affirmed.

AFFIRMED.



HELEN NEENAN,

Appellee,

vs.

NATIONAL COUNCIL OF THE KNIGHTS  
AND LADIES OF SECURITY,  
Appellant.

Appeal from  
Superior Court,  
Cook County.

188 I.A. 490

STATEMENT OF THE CASE. This is an appeal from a judgment for \$920 rendered April 12, 1913, by the Superior Court of Cook County, following the verdict of a jury, in favor of Helen Neenan, plaintiff below, and against National Council of the Knights and Ladies of Security, a fraternal beneficiary society, defendant below.

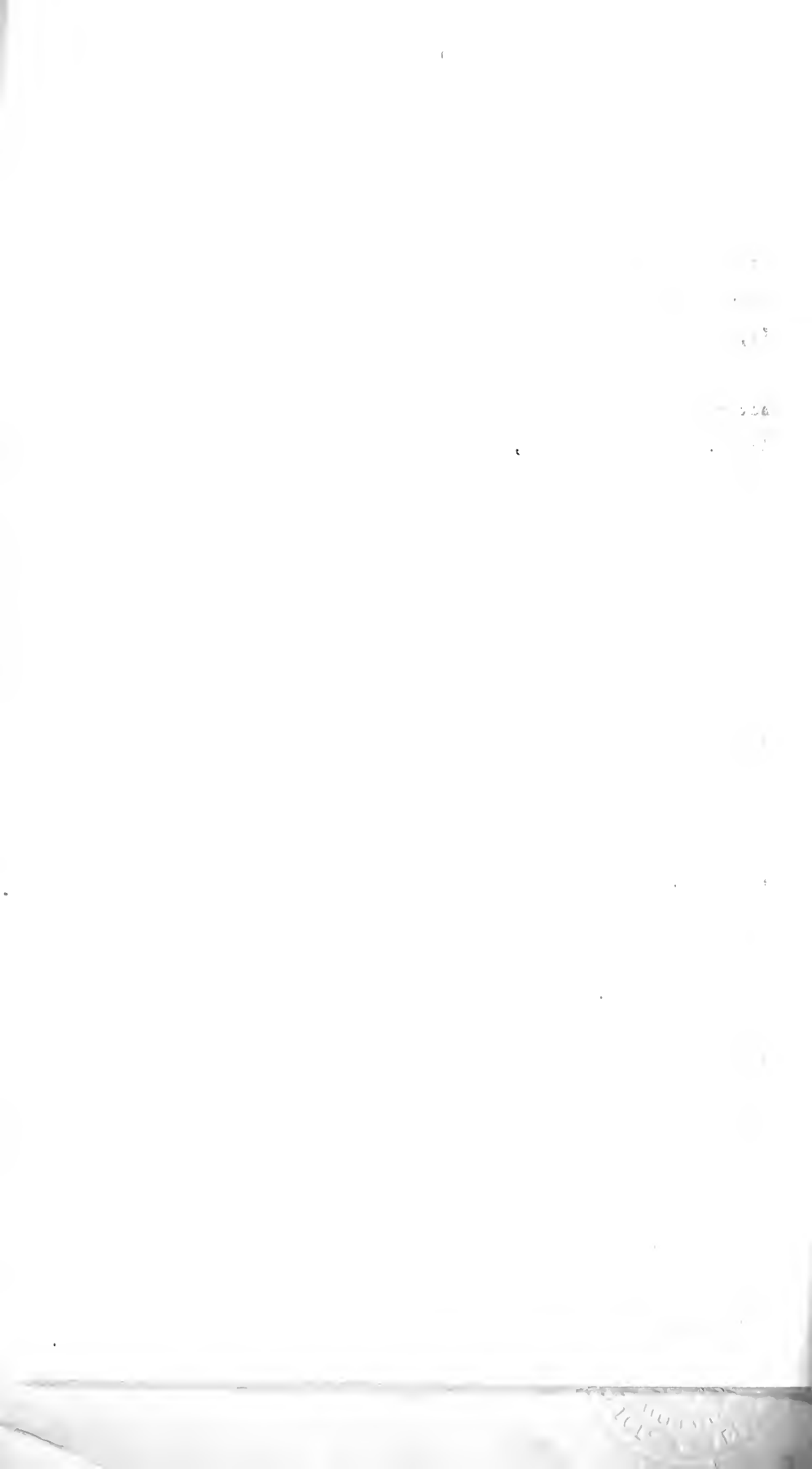
In plaintiff's declaration, which consisted of one count, it was alleged in substance that on September 3, 1908, the defendant admitted Jeremiah Neenan to membership in the local council, No. 741, of the Order, located in Chicago, and issued to him a beneficiary certificate, duly signed by the officers of the national council of the defendant society, and duly signed by said Neenan "for the purpose of accepting the conditions of said certificate"; that defendant by said certificate promised to pay plaintiff, wife of said Neenan, upon his death the sum of \$1,000, upon the terms and conditions in said certificate mentioned; that said Neenan died on October 7, 1909, at Chicago, while in good standing in said Order; that he during his lifetime, and plaintiff at all times since his death, complied with all the requirements of the certificate and the laws of the Order; that by means thereof defendant became liable to pay plaintiff the sum of \$1,000; and that defendant has refused to pay said sum or any part thereof, wherefore there is due to plaintiff the said sum, together with interest thereon, at 5% per annum, from August 12, 1910, etc. The benefi-





diary certificate was set out in haec verba in the declaration, and in one clause thereof it was provided that should said Neenan die within 18 months of the delivery of the certificate the National Council should be liable for only 30 per cent. of said \$1,000.

The defendant filed a plea of the general issue and several special pleas, all of which, except the sixth, were withdrawn. This sixth plea, as amended, alleged in substance that the contract of membership between the defendant and said Jeremiah Neenan was composed of the certificate, application and by-laws of the defendant society; that it was provided in the by-laws that each member should pay one assessment each month on or before the last day of the month; and that if the member failed to pay said monthly assessment on or before the last day of said month said member should stand suspended without notice and all his rights forfeited under said certificate, but that he might reinstate himself at any time within 60 days from the date of said suspension by the payment of the current assessment and local council dues, and all arrearages of any kind, provided he be in good health; that by virtue of the contract between said Neenan and the defendant society there became due on August 1, 1909, a certain assessment from said Neenan, payable on or before the last day of said month of August, and that there became due on September 1, 1909, a certain assessment from said Neenan, payable on or before the last day of said month of September; that said August assessment was not paid during said month of August or during said month of September, and said September assessment was not paid during said month of September; that said Neenan became suspended on September 1, 1909, and remained in suspension up to and including the time of his death, October 7, 1909, and was not a member of the defendant society in good standing at the date of his death, and that neither he, nor anyone in his behalf, while he was living and in



good health, paid any assessment for the purpose of reinstating him; that on or about October 7, 1908, while said Keenan was in suspension and not in good health, assessments for the months of August, September and October, 1908, amounting to \$4.50, were paid to the financier of said local council to which said Keenan belonged, and said payments were taken by said financier without knowledge on his part, or that of any officer or agent of the order, that said Keenan was not in good health; that thereafter, and immediately upon defendant learning that said Keenan was not in good health when said payments were made and before the beginning of this suit, said financier sent to plaintiff a check for the amount of said payments, which check has not been returned but has been retained by plaintiff, and which check has been at all times of the value of said payments.

To this special plea the plaintiff filed a replication in which it was alleged, in substance, that said Keenan was a member of the defendant society in good standing, as provided for in said contract, up to and including the time of his death; that while living and in good health he paid all assessments due from him for the purpose of his reinstatement and which did reinstate him before he died; that on October 7, 1908, "while the said Keenan was in good health," assessments for said months of August, September and October, amounting to \$4.50, were paid to and taken by said financier and the latter did not return "to said Keenan" the amount paid by plaintiff.

At the beginning of the trial the defendant made a legal tender in open court to the plaintiff of \$4.50, together with costs of suit, and interest thereon, but the tender was refused. Plaintiff testified in her own behalf and introduced in evidence the beneficiary certificate sued on and a receipt book showing the payments of dues and assessments on Keenan's account and the times when made. On behalf of the defendant, Harry W. Amey, the financier



testified,  
of said local council, No. 741, and defendant introduced the application of the deceased for membership, the constitution and by-laws of the defendant society, the certificate of death of said deceased, a check for \$4.50 and letter accompanying the same, dated October 9, 1909, sent by defendant to plaintiff, and several other documents. In rebuttal the plaintiff again testified, and also a witness named Mrs. Mulvahill. At the conclusion of all the evidence the defendant moved for a directed verdict in its favor, but the motion was denied. The court directed that the testimony of the witness Mrs. Mulvahill, as well as certain portions of plaintiff's testimony, as to "custom" and as to "her delinquency in payments" be stricken from the record and disregarded by the jury. It was admitted in open court by the attorney for plaintiff that Jeremiah Neenan was not in good health on October 7, 1909, when the dues and assessments, aggregating \$4.50, were paid on said Neenan's behalf to said Amey, financier of the local council, and that at and before that time said Amey had no knowledge that said Neenan was not in good health; and it was further admitted that a good and sufficient tender of said \$4.50 was seasonably made by the defendant to the plaintiff about the time of the death of said Neenan. And it was stated by the court to the jury that the attorney for plaintiff admitted that "in no case could there be a verdict for more than \$920," viz: \$300 and interest. Three instructions offered by the defendant were given, and ten instructions offered by the plaintiff were refused. The court of his own motion wrote and gave to the jury two instructions, numbered 4 and 5. Instruction No. 4 referred to a certain "established custom and method of doing business adopted by the defendant" governing suspensions, and as to the time the financier made his monthly reports to the National Council, and was to the effect that if the jury believed there was such a custom and method, which was known both to the insured and the National Council, and that said Neenan,



on October 7, 1909, was in arrears for the month of September, 1909, only, and the financier, Amey, had not yet reported said Keenan to the National Council as delinquent, and that on said date Keenan had paid all his assessments in full, then the jury might find the issues for the plaintiff. Instruction No. 5 was to the effect that all evidence received and afterwards stricken out by the court must be disregarded by the jury.

The membership receipt book offered in evidence showed that Keenan's assessments and dues amounted to the sum of \$1.50 per month; that said sum was paid to said financier of the local council for the months of November, 1908, and January, 1909, before the last day of each month; that like sums were paid for the months of October and December, 1908, and February, March, May, June and July, 1909, within 60 days after the last day of said months, respectively; that a like sum due for the month of April, 1909, was not paid to said financier until July 15, 1909; and that like sums due respectively for the months of August, September and October, 1909, were paid on October 7, 1909. Amey, the financier, testified that he personally had a verbal arrangement with plaintiff, who was also a member of the defendant society, that if either plaintiff or Jeremiah Keenan was behind in the payment of dues and assessments, he would pay out of his own pocket one month's assessment for them and plaintiff would subsequently repay him; that he was accustomed to forward to the National Council a written report about the 30th of each month, remitting for assessments paid by members during the preceding month, and giving the names of members suspended for non-payment of assessments; that he paid Keenan's April, 1909, assessment out of his own personal funds and did not report him as being in suspension when he forwarded said written report about May 30, 1909; that he also advanced Keenan's August, 1909, assessment out of his own personal funds and did not report him as being in suspension when he forwarded said written





report about September 20, 1909, but that, Neenan not having paid the September, 1909, assessment to the local council on or before September 30, 1909, or repaid to Amey the August assessment so advanced, he (Amey), in his October report, reported Neenan as being in suspension for failure to pay the September assessment; that at no time on either the books of the local council or the National Council did it appear that Neenan was in suspension as long as 60 days, and that after Neenan's admission as a member he was not re-examined by the medical examiner. Plaintiff testified that in case she was at any time in arrears as to the assessments of either herself or husband, Amey had agreed to carry them; that nothing had been said by Amey about his advancing the assessment for only one month, and that she never said anything to her husband about the arrangement with Amey.

It further appeared from the evidence that Jeremiah Neenan died at his home at 11:45 P.M. on October 7, 1909, of pneumonia; that he had been confined to his bed for four or five days prior to his death; that on the evening of his death plaintiff's brother took the \$4.50 to the lodge room to pay the deceased's dues and assessments for August, September and October, 1909; that said amount was received by Amey, the financier, about ten o'clock in the evening, and that Amey did not know that Neenan was ill until about 11 o'clock that evening, when he was so advised by a member of the lodge.



MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is contended by counsel for the defendant that (1) the verdict is not supported by the law or the evidence, and that the court at the conclusion of all the evidence should have directed a verdict for the defendant; (2) that the trial court erred in admitting improper evidence, prejudicial to the defendant, and the subsequent action of the court in striking out the same and instructing the jury to disregard said evidence did not cure the error; and (3) that instruction No. 4, given by the court of his own motion, was erroneous and prejudicial.

In view of the conclusion we have reached it will unnecessary for us to consider the 2nd and 3rd points above mentioned. In our opinion there can be no recovery had against the defendant in this case, and the court erred in entering the judgment.

It is well settled in this state that the constitution and by-laws, the application for membership and the benefit certificate, together constitute the contract of insurance (Love v. Modern Woodmen, 259 Ill. 102, 106); and that parties competent to contract are at liberty to enter into such agreements with each other as they see fit, and it is the purpose of the law and the function of the courts to enforce these contracts. (Croese v. Knights of Honor, 254 Ill. 80, 84.) In his application for membership in the defendant society Keenan agreed that should he cease to be a member of the order, either by suspension, expulsion, or otherwise, he thereby released and forfeited all claim to the beneficiary funds, and that, if accepted as a member, he would faithfully abide by all the laws of the order. The beneficiary certificate issued to Keenan provided that at his death the National Council would pay plaintiff the sum therein mentioned, "he hav-



ing complied with all the provisions of the Constitution and Laws of the Order \* \* \* and being at the time of his death a member of the Order in good standing"; and the certificate contained a clause to the effect that the certificate was issued in consideration of the warranties and agreements contained in the application, and his agreement to pay all assessments and dues which would become due while he remained a member. Section 112 of the by-laws of the society provides that all assessments for every month shall become due and payable on the first day of the month, and that the certificate of each member who has not paid such assessments and dues "on or before the last day of the month shall, by the fact of such non-payment, stand suspended without notice, and no act on the part of the Council or any officer thereof, or of the National Council, shall be required as essential to such suspension, and all rights under said certificate shall be forfeited." This provision is self-executing. (National Council v. Burch, 126 Ill. App. 15, 20; Lehman v. Clark, 174 Ill. 279, 288, 292.) Section 114 of the by-laws provides that any beneficiary member, suspended by reason of non-payment of assessments or dues, "may be reinstated by payment within 60 days from the date of suspension, of all arrearages of every kind, including assessments and dues, for which he would have been liable had he remained in good standing; Provided, however, That he be in good health at the time of reinstatement; Provided, further, That the receipt and retention of such assessment or dues, in case the suspended member is not in good health, shall not have the effect of reinstating said member, or of entitling him or his beneficiaries to any rights under his benefit certificate." The evidence in the present case shows that Neenan did not pay the August, 1909, assessment and dues, but that Amey paid them for him, by virtue of a private understanding between Amey and plaintiff, which was unknown to either Neenan or the National Council of the society, and that neither Neenan nor anyone for him paid the Sept-



ember, 1908, assessment and dues. By the non-payment of said assessment and dues on or before the last day of September, 1908, Neenan was, by virtue of section 112 of the by-laws, ipso facto suspended and he forfeited all rights under his certificate. He could, however, be reinstated as a member of the society, under section 114 of the by-laws, by making payment within 60 days of the date of said suspension of said assessments and dues and all arrearages, provided he was in good health at the time of reinstatement. The evidence further shows that, on October 7, 1908, within about two hours of the death of Neenan, while he was then in the last stages of a mortal illness, plaintiff, then knowing that he was seriously ill, caused her brother to pay to Amey, the financier of the local lodge, said past due September assessment and dues, the October assessment and dues, and the August assessment and dues, previously advanced by Amey; that the said sums, amounting to \$4.50 were received by Amey without knowledge on his part or that of any officer of the defendant that Neenan was not in good health, and that Amey shortly thereafter returned to plaintiff the check of said local lodge for said sum, which plaintiff retained. We do not think Neenan was reinstated as a member. He was not eligible for reinstatement. (Buata v. Court of Honor, 172 Ill. App. 71, 76.) Furthermore, plaintiff, when she caused the said sum to be given to Amey, knowing at the time that Neenan was seriously ill, was not acting in good faith towards the society. (Royal Highlanders v. Scovill, 68 Neb. 213, 220.) And we do not think that the evidence sufficiently discloses any waiver on the part of the defendant society. The private agreement between Amey and plaintiff that the former would advance the assessment and dues for one month, or more, in case the same were not paid by Neenan or plaintiff, was not shown to have been known either to Neenan or the National Council. And the agreement was beyond the scope of the authority of Amey to make, as an agent of





the defendant society, and not binding upon it. (Love v. Modern Woodmen, 252 Ill. 102, 107.) Considerable evidence was offered and admitted on the trial in an attempt to show that leniency had been extended customarily by the local lodge to certain members thereof as to the payment of their assessments. Most of the evidence was subsequently stricken out by the court, but some of it remained. In our opinion it was all incompetent. "Proof of a custom is never allowed to overcome the express terms of a contract." (Benevolent Society v. Baldwin, 26 Ill. 478, 487; Dillon v. National Council, 148 Ill. App. 121, 130.)

The judgment of the Superior Court will be reversed with a finding of facts, and judgment for the defendant will be entered here.

REVERSED AND JUDGMENT HERE FOR THE DEFENDANT.

FINDING OF FACTS. We find that the insured, Jeremiah Keenan, failed to pay the September, 1908, assessment and dues and thereby became suspended as a member of the defendant society, National Council of the Knights and Ladies of Security; that said insured was not thereafter and before his death, on October 7, 1909, reinstated as a member of said society, and was not a member of the society in good standing at the time of his death; that the defendant society did not waive the default causing the suspension of the insured; and that the defendant society is not indebted to the plaintiff, Helen Keenan, upon the beneficiary certificate sued on.



ELIZABETH STANTON,  
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,  
Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

188 I.A. 502

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

Appellant, Chicago City Railway Company, defendant below, prosecutes this appeal from a judgment of \$3500, recovered by appellee, Elizabeth Stanton, plaintiff below, in an action on the case, on account of personal injuries alleged to have been sustained by the negligence of appellant. The parties will be designated as plaintiff and defendant.

The declaration contained one count. The negligence averred is that on December 15, 1910, while the plaintiff was entering a street car owned and operated by the defendant in the city of Chicago, and before the plaintiff was able to get securely upon the platform of the car, the defendant, through its servants in charge of the operation and management of the car, negligently started the car forward without notice or warning to her, and with unusual force and violence, so that the plaintiff was thereby thrown from the car to and upon the ground and injured.

The plaintiff was a dressmaker, living at 5149 Emerald avenue, Chicago. Her regular way of going home from the place of her employment was to ride west on a 47th street car from Langley to Halsted street, and then to transfer and go south on Halsted street to 52nd street. She left her place of work about 5:30 in the evening of December 15, 1910, and rode west on a 47th street car, accompanied by Mrs. Meyers, another dressmaker. The plaintiff and Mrs. Meyers received transfers and dismounted at the east side of Halsted street; they then crossed over to the northwest corner of the intersection of Halsted and 47th streets, and wait-



ed for a southbound Halsted street car. This was an important junction point and a number of persons were at the time waiting to board cars. Some Halsted street cars ran south as far as 69th street, and others ran as far as 79th street. Both classes of Halsted street cars ran as far south as plaintiff and Mrs. Meyers desired to go, the plaintiff desiring to leave the car at 52d street and Mrs. Meyers at 69th street.

After they reached the northwest corner, a number of southbound cars arrived, but the women did not board them either because they were Center avenue cars running west from that point or because they were too crowded. Finally a southbound Halsted street car came up, and stopped a little north of the north line of 47th street. This car was a double truck, pay-as-you-enter car with a large rear platform, partitioned off in the manner that pay-as-you-enter platforms are usually arranged. On behalf of defendant it is claimed that the car was very crowded and that a large number of persons boarded the car ahead of the plaintiff. Plaintiff does not concede that the car was so crowded as defendant's witnesses testified it was, and plaintiff and Mrs. Meyers did not state that as many passengers boarded the car ahead of plaintiff as defendant's witnesses did, though these witnesses testified that five or more passengers got on ahead of plaintiff. Plaintiff followed the other entering passengers and had placed her right foot on the step and her left foot upon the platform, and had grasped the upright bar that divided the entrance of the platform, when the car started. The lower step of the car was 14-1/2 inches above the ground and the platform was 13-1/2 inches above the step, so that the platform was 28 inches above the ground. The conductor stood on the rear platform in the railed-off space in which conductors usually stand on those cars. When the car started, Mrs. Meyers had not got on the car, but remained on the ground with many other persons waiting to board cars.



On behalf of plaintiff it was claimed that she was thrown to the ground by the starting of the car and that the car started with some jerk. She testified that although she had both feet on the car, one on the platform and the other on the step, and although she had a firm hold of the upright bar with her right hand, the starting of the car dislodged her so that she was swung around against another passenger who had been standing north of her on the step, so that her body then swung around with her back to the south, and that her feet, one at a time, slipped off the car. The only witnesses to the occurrence on plaintiff's behalf were herself and her friend, Mrs. Meyers.

On behalf of defendant it was claimed that plaintiff fell by reason of her attempting to step off backwards from the moving car as soon as she discovered that the car was starting and leaving her companion behind. Defendant contended that the sole cause of the accident was plaintiff's voluntary act in stepping from the car in such a manner that she herself lost her balance by getting off backwards. Defendant's witnesses denied that there was any unusual jerk or lurch in connection with the starting of the car, and denied that plaintiff's body was swung against that of any other passenger. Six witnesses on behalf of the defendant testified as to the occurrence. The conductor died before the trial. Some of defendant's witnesses did not see the whole transaction. All of them testified that there was no sudden lurch or jerk in connection with the starting of the car. Three of them testified that the conductor, before starting the car, called out a warning that he was about to start the car and that no more passengers should enter. Three other witnesses testified that plaintiff voluntarily stepped off the car after it had started in motion. These last mentioned witnesses testified that Mrs. Meyers called out, "Oh, Lizzie," or something to that effect, which was just before plaintiff stepped from the car.





Plaintiff fell with her head to the south and with her feet to the north. She struck first on the back of her head which was protected by her hair and by a turban hat she wore. She was immediately assisted to her feet and asked whether she wished an ambulance to take her home. She declined that aid and said she was able to get home on the street car. With Mrs. Meyers she boarded a following street car and rode on it to 52d street. Mrs. Meyers did not leave the car with her. Plaintiff happened to know a young lady on the car, who was not called as a witness, and that young woman then walked home with plaintiff to her home on Emerald avenue, a little over a block from the place where plaintiff left the car. Plaintiff walked upstairs to the apartment of her sister. She testified that she felt pain particularly in the back of her head and along her back.

She did not call or consult any physician for over two months after the accident. On February 17, 1911, she went to see Dr. John B. Murphy, who examined her and turned <sup>her</sup> over to an assistant, Dr. John F. Golden. Dr. Golden diagnosed her condition as tubercular inflammation of the spine. An inflammation of the spine is called a spondylitis, and when a spondylitis is tubercular, it is called Pott's disease. Dr. Golden was of the opinion that plaintiff's trouble was Pott's disease. The part of her spine which he claimed was thus affected was in the lower dorsal region, below the waist line. There was no abrasion of the skin or marked bruise at the point at which it is claimed the Pott's disease afterwards developed. Plaintiff testified that there was a slight puffiness or swelling and redness at that point which she observed by looking at it in a mirror. At the time of the trial, according to the testimony of Dr. Golden, the tubercular infection had ceased and plaintiff was considerably improved. He testified that his treatment and her wearing of a cast and leather jacket had eliminated the tubercular condition, so that while plaintiff's spine was not



quite as strong as it had been, it was not afflicted with acute Pott's disease at the time of the trial.

The defendant contends on the record that the verdict and judgment on the issue of liability are manifestly contrary to the preponderance of the evidence; that the damages are grossly excessive on any theory of the injury; that plaintiff's counsel made many improper and incurably prejudicial statements on the trial; that the court erred in giving an improper instruction, and also erred in admitting incompetent evidence.

It is contended on behalf of defendant that the trial before the jury was unfair and was not free from circumstances calculated to mislead or prejudice the jury. On the cross-examination of McNamee, a witness for the defendant, plaintiff's counsel interrogated the witness at length with respect to the first time he had been interviewed by the company to ascertain what he knew about the accident, and with reference to the talks he had had with the defendant's representatives before the trial. Counsel insinuated that McNamee was not at the place of the accident. He said to the witness, when he was questioning him about how he happened to be at the intersection, "Did you have an intuition that an accident was going to happen?" He cross-examined the witness at length as to where he had been on the day of the accident and how he happened to be on the corner of 47th and Halsted streets at the time. The substance of the cross-examination was an attempt to show that the witness' testimony was a fabrication of recent date. On the re-direct examination defendant offered to show, that in the letter, which McNamee had testified to on cross-examination he wrote to the company a few days after the occurrence, replying on its inquiry blank form to questions there propounded, he gave the same account of the occurrence that he had given on the stand. To overcome the effect of defendant's offer of testimony, plaintiff's counsel, it is claimed, made



grossly improper statements calculated to prejudice the defendant before the jury in the following examination:

"Q. Mr. McNamee, did you receive - you mentioned that you received a letter, asking you to state what the facts were. I ask you, was that the letter? (Exhibiting paper to witness).

A. Yes, sir.

Q. Up to the time that you wrote that letter, in answer to the inquiry as to what you knew of the facts, <sup>had</sup> you talked with anybody at all connected with the Chicago City Railway in connection with the accident?

A. No, sir.

Mr. Condon: I offer this in evidence.

Mr. McShane: I object to it.

Mr. Condon: I will ask you to read that over to yourself (handing paper to witness).

Mr. McShane: If a man go out and fix up those kind of things with employes, getting it ready for the purpose for which it is being used, the whole thing would be a farce.

Mr. Condon: I object to the statement, if the court please, that there has been any 'fixing.' It carries with it - it is a term that has a common and well known application. It is a term used commonly by men who charge others with wrong doing, and I object to Mr. McShane's statement as just made.

Mr. McShane: I mean writing it, your Honor.

Mr. Condon: Oh, you mean- yes, you mean nothing. I am objecting to what he said, and I will ask the court to rule on it as an absolute outrage.

Mr. McShane: Wait. I say- I mean preparing a statement in writing, writing the statement, and I mean nothing else, that is all.

The Court: With that explanation, I think it may stand.

Mr. Condon: Now, then, after having read that statement, do you desire to change or modify any part of the testimony you have given here?

Mr. McShane: I object to that, your Honor.

Mr. Condon: He is trying to make it appear - the reason I ask that -

Mr. McShane: If he has not a right to get it in directly, he has not a right to get it in this roundabout way, and I object to it.

Mr. Condon: Would you like to look at it?

Mr. McShane: No, I don't want to look at it. It is cheap.

Mr. Condon: I object to that statement.

Mr. McShane: What I meant was-

Mr. Condon: He makes an unfair statement, and then apologizes.

Mr. McShane: You are trying to make something out of it.

You asked me if I want to look at it. I know all those things, and it is sickening to me -

Mr. Condon: I object to that remark, that it is cheap, and ask the court to rule.

The Court: That remark may be stricken out.

Mr. McShane: I want to say, he held this to my face, and asked if I wanted to see it, and I certainly think it is very - I don't care for it.

Mr. Condon: Very what? Why don't you be courageous?

Mr. McShane: Yes. You want to get a few more exceptions. If it was not for that, I would be very candid with you.

(Thereupon the jury were excused from the court room.)



Mr. Condon: I desire to move that a juror be withdrawn in this case, and that we proceed immediately either to the empaneling of another jury, or that the case be continued, because of the remarks, and imputations in the remarks, made by Mr. McShane regarding the witness who has just testified, and the defendant in this case.

(Motion overruled; to which ruling the defendant duly excepted.)"

One witness, Dupil, was employed by a chattel mortgage man, and in the cross-examination of Dupil, plaintiff's counsel resorted to the following methods. Dupil testified:

"Mr. Lynch's business is that of a money broker. He does not lend money on wages, he loans on chattels. I am a collector for a chattel mortgage man. I have been a witness before.

Q. How many times?

A. I think only the once.

(Objected to by defendant as being immaterial unless there was one or the other of the parties to this lawsuit involved.)

Mr. McShane: Some men have a habit of being witnesses.

Mr. Condon: I object to that statement.

The Court: Objection sustained.

I never testified as a witness for this company before.

Q. Did you testify in a personal injury suit or death suit for anybody before?

(Objected to by defendant unless the question has reference to this defendant or plaintiff; objection overruled; to which ruling defendant duly excepted.)

A. No, sir.

Q. Are you sure?

A. To the best of my recollection.

Q. Can't you put it better than that?

A. To the best of my recollection.

(Objected to by defendant; objection sustained.)

I am forty-five years old and have been working for this chattel mortgage house eight years.

Q. In other words, they have a mortgage on people's furniture, and you go there, and if they don't put up, you throw them out.

(Objected to by defendant; objection sustained to the question)

Mr. Condon: I object to the manner and conduct of counsel in putting questions in that manner, seeking to bring discredit upon the witness. I am objecting to counsel's conduct in putting the question.

(Objection overruled; to which ruling defendant duly excepted.)

Q. What do you do now, what is your work?

A. Well, as a collector, to collect accounts that are a little back in their payment, a little slow.

Q. What do you do towards pushing them up a little when they are a little behind?

A. I talk to them and ask them about their accounts.

Q. Do you seize their property?

(Objected to by defendant as immaterial; withdrawn.)

Mr. Condon: I object to counsel asking frequent questions and then withdrawing them when objection is made, as improper."

A little later in the cross-examination of Dupil, the following occurred:





"Q. Do you know of the claim agents, lawyers, detectives, or anything of that kind?

Mr. Condon: I object to the remark 'detectives.'

Mr. McShane: Or investigators.

Mr. Condon: Just a moment. There is some more of it. I object to his making the statement in the sneering manner in which he does. It is improper, and I think, if the court please, that a counsel with an experience such as he has at the bar for so many years ought to be told that he should not do it. It is unjust if the time has arrived when counsel can, by his sneers, throw slurs both upon this defendant and the witnesses produced by it, and I object.

Mr. McShane: Let me suggest. About every time I ask a question, he gets up and makes one of these speeches, tantalizing in their character, to try and provoke a reply. He wants me to say something that a complaint may be made of later on. I have sat here quite patiently listening to his orations. Everything I say, he puts this and that meaning on it, and makes a speech, and I must sit here mute. I don't see that there is a thing that is asked this man that it is not perfectly proper. If he objects to the use of the word 'detectives,' I could say 'investigators,' and I just asked him now if he knows - if he has any acquaintance with any one connected with the legal or investigating department of this railroad.

Mr. Condon: I would not object to such a question, but I am objecting to his employing a term with an intent to cast a reflection upon this defendant, employing the word 'detectives,' and the manner in which he does it, with that beautiful sneer of his."

Counsel afterwards repeated the testimony of the witness and asked him whether what he had said was true. After the witness had testified that he had given the conductor, on the night of the accident, the witness card which was exhibited to him on the trial, plaintiff's counsel broke in with the remark: "You could write that card if you had it yesterday, and if you had another one, you could write it now, couldn't you?"

In cross-examining defendant's witnesses, counsel for plaintiff resorted to the following:

"Q. Do you know John Harrington?

A. No, sir.

Mr. Condon: Mr. Harrington is not connected with the City Railway.

Mr. McShane: He is a graduate of your institution."

In the cross-examination of McGuire, counsel remarked that he questioned McGuire's being present at the place of the accident at all. At the time of making this remark, counsel thought he had put the witness in an embarrassing position by forcing the witness to admit that he had been calling upon a married woman, though it later



appeared that the married woman was a relative of the witness and that the witness had been visiting her with the rest of her family.

Later, in the cross-examination of McGuire, counsel put a question and then interrupted the witness when the latter started to answer it. Defendant's counsel remarked: "He started to answer and you interrupted him." Mr. McShane then said: "You are sparring here for time; he is just giving this gentleman a chance to get his wind. It is a fact, it is evident what the purpose is."

It appears from the record that the entire arguments were finished and concluded in the case at 4:30 p. M. The following occurred at the close of the argument:

Mr. Condon: As it is rather late it is not fair to the jury to send them out at this time; the question ought to be left to the jury.

Mr. McShane: I object to any talk in the presence of this jury, just some cheap talk -

Mr. Condon: I believe myself this ought to be put up to the jury, as to whether they prefer to go out tonight or tomorrow morning.

Mr. McShane: That's it; a little cheap talk; a little play for the jury.

Mr. Condon: Not at all. Let them decide it. I think they ought to decide it at this hour. It does not make any difference to me.

Mr. McShane: You want a little cheap play here.

Mr. Condon: There is no cheap play about it, Mr. McShane. I have always done it, and you know it.

Mr. McShane: You have always made every little cheap play you could.

Mr. Condon: I have always done it, and it is the practice here. I tried a case last week and the court put the question up to the jury himself. What are you talking about?

Mr. McShane: Any little cheap play -

Mr. Condon: I am going to ask this court to do it. Let them decide it, that is all I am suggesting. I do not care how they decide it.

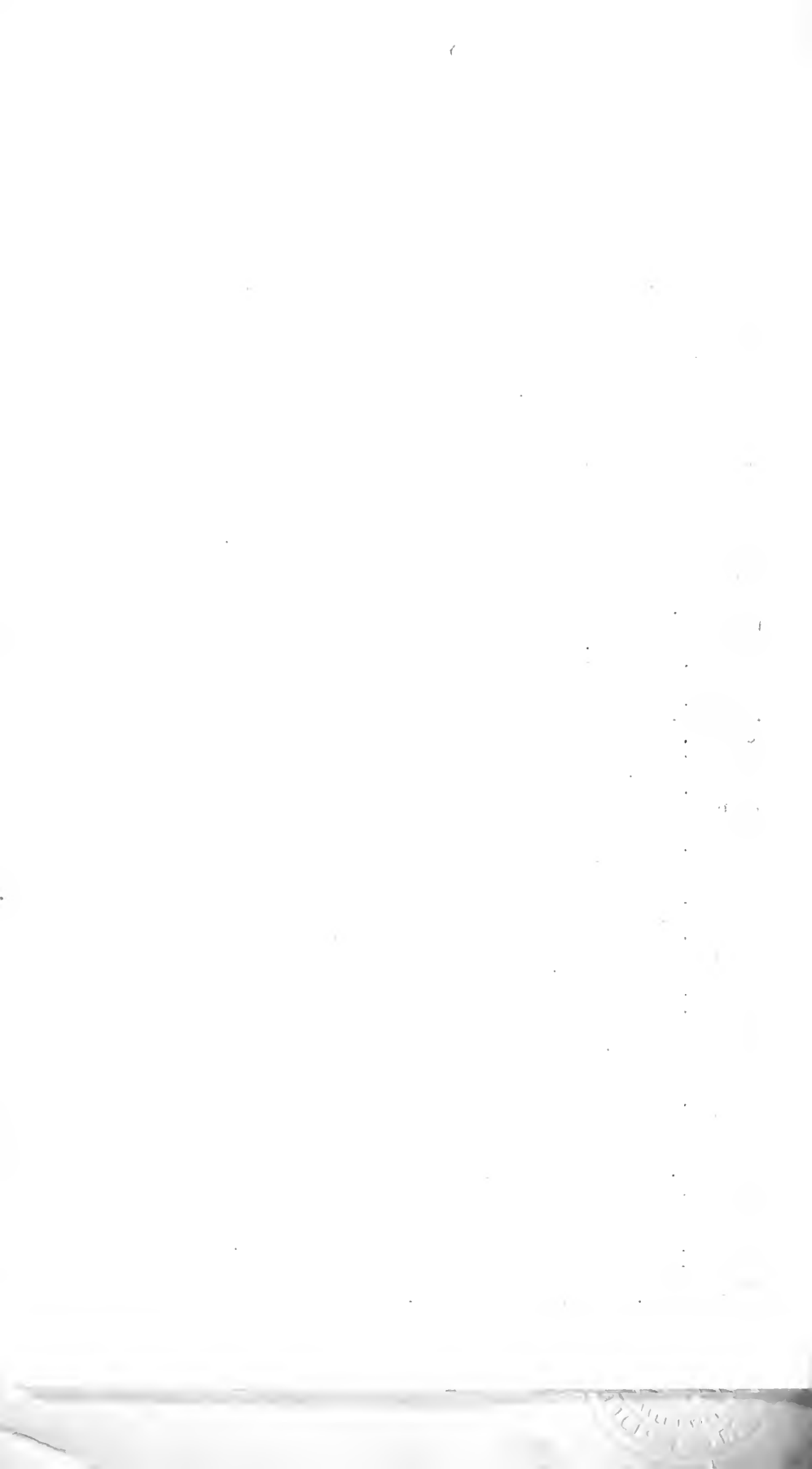
The Court: Gentlemen, what is the wish of counsel as to instructing the jury tonight?

Mr. McShane: You see, it just prejudices my - it puts this girl's case - prejudices this girl's case, because some of the jurors may want to go now. I think we all want to get through with this case, and I would very much prefer to have it all over with now. That is my wish.

Mr. Condon: My judgment about it is that sending out a jury at quarter to five - it is going to take probably half an hour to read the instructions.

Mr. McShane: It won't take fifteen minutes.

Mr. Condon: Well, it may be fifteen minutes, but it is a matter that ought to be put to the jury. Your Honor, it is not only proper, but frequently done.



Mr. McShane: I have been here longer than he has, and I say it is not customary and it is not frequent. It is very rare.

The Court: This jury were held over from last week. We will consult the wishes of the jury. Gentlemen of the jury, do you prefer to take your instructions and go out tonight, or would you prefer that it go over until morning?

(Thereupon the jury took a vote, and decided to wait until the following morning to receive their instructions, and retired.)"

At the end of the re-direct examination of plaintiff's witness, Dr. Golden, the following occurred:

"Q. I dislike at this time, if the court please, to detain the jury; I am going to ask the doctor to return Monday for further cross-examination.

Mr. McShane: I object to that; he knows perfectly well that he cannot possibly detain the doctor but a few minutes longer.

Mr. Condon: I will try and do the best I can; I am not anxious to detain the doctor, but I also am not anxious to hold these twelve men.

Mr. McShane: You are not anxious about this jury; you are just playing for their sympathy.

Mr. Condon: The doctor may answer in four or five questions. If he answers as I assume the answers would be, why, we possibly can conclude it in five minutes."

In his closing argument to the jury, Mr. McShane said:

"To repeat, if there was no more room in that car, and that conductor knew it, and he started that car, and you know how fast they run - with a woman out there standing on the step, it is almost criminal to start a car and run between blocks with a woman standing out there on the step -

Mr. Condon: I object, if the court please, to the remark of counsel that his conduct was almost criminal.

Mr. McShane: So do that thing would be almost criminal.

Mr. Condon: What is the court's ruling?

The Court: Proceed."

In our opinion the presiding judge failed to control counsel for the plaintiff in the cross-examination of the witness, and in his remarks before the jury, characterizing motions made by counsel for defendant and suggesting improper motives to defendant's counsel when there was no basis in the proceeding to warrant such insinuations. The court also failed to rule on proper objections when made by defendant's counsel to the remarks of plaintiff's counsel during the taking of testimony and in his closing argument to the jury. The remarks of plaintiff's counsel above quoted were calculated to arouse hostile and intemperate feelings in the minds



of the jurors and to prejudice the jurors against the defendant. A trial during which counsel is permitted to conduct himself in the manner in which plaintiff's counsel in this case did, is not a fair trial. Counsel's conduct and remarks were calculated to prevent that calm and unbiased consideration of the evidence which is indispensable to a fair and impartial verdict. Now far the conduct of the plaintiff's attorney was potent to produce unfair results, we cannot say; but, it is better that appellee be put to the trouble and expense of another trial than that this court should appear to countenance and commend such violation of legal ethics. (West Chicago St. R.R. Co. v. Kean, 104 Ill. App. 147). Making accusations that the opposing party and counsel are guilty of deception or other dishonorable methods, when there is no evidence to warrant the accusation, is itself reversible error. (Scott v. Chicago & Alton R.R. Co., 232 Ill. 419; Wabash Ry. Co. v. Billings, 212 id. 37). In the Scott case, supra, the court said: "It would be a reproach and disgrace to the law and the courts if cases should be tried and the rights of the parties determined upon such grounds as the attorney presented to the jury as arguments in this case, or if a party could be permitted to retain the benefit of a verdict and judgment obtained by such means."

At the request of the plaintiff, the court gave the following instruction to the jury:

"9. If under the evidence and instructions of the court, you find that the defendant is legally liable for and on account of plaintiff's alleged fall from or in connection with the street car; and if you further find from the evidence that plaintiff sustained injury to her spine as a direct and proximate result of said fall; then, and in such event, you are instructed that even though plaintiff had tubercular germs in her blood at the time of said fall, yet, if you further believe from the evidence that as a natural and proximate result of said injury said tubercular germs lodged at the point of said injury, and thereby caused a diseased condition of her spine, and that such diseased condition of her spine would not have occurred except for said fall and injury, then the defendant is legally responsible for said diseased condition of her spine."





The instruction is objectionable upon the ground that it submits to the jury a question of law, whether the defendant is legally liable. It should have submitted the question of fact to the jury as to whether the defendant was guilty of negligence in operating the car in question, thereby causing the alleged fall of the plaintiff.

The further objection to the instruction is made in argument that it authorizes a recovery of damages on a ground not alleged in the declaration which does not allege a right to recover damages for an aggravation or arousal of a diseased condition as outlined in the instruction. Under the holdings in *Chicago Union Traction Co. v. May*, 221 Ill. 536, and *Chicago City Railway Co. v. Saxby*, 213 Id. 274, we think this objection to the instruction is not bound. These decisions are not in harmony with the decisions in Michigan and Ohio, and, perhaps, other states.

On the direct examination of Dr. Golden, he was asked the following question:

"Dr. McShane: Assume, doctor, that her injury - that this woman, on December 15, 1910, fell from the step of a street car and landed on her back. Have you an opinion as a medical man as to whether that injury was sufficient to cause the condition you have described?"

The question was objected to as not a hypothetical question; that it usurped the function of the jury; that it was for the jury to determine whether the accident caused or produced the condition. The objection was overruled, and defendant excepted. The witness answered, "yes, sir." He was then asked: "What is your opinion, doctor?" The same objection was made and overruled. The witness answered: "It was sufficient to cause the condition I found and treated her for."

In the next question counsel for plaintiff gave a history of a suppositious case, and then asked: "Upon that history, have you an opinion as to whether or not that fall was the cause of that



swelling and the other conditions you have described?" The same objection was made and the same ruling by the court followed. The witness answered, "I have." Q. "What is it?" A. "That the fall was the cause of her present condition." The same objection and ruling occurred before the answer. Defendant's attorney then moved to strike out the answer on the same grounds and further that the doctor was not asked as to the cause of her present condition.

"The rule is that a witness cannot be permitted to give his opinion on the very fact which the jury is to determine." (Illinois Central R.R. Co. v. Smith, 208 Ill. 308). In City of Chicago v. Didier, 227 id. 571, there was no dispute as to the manner and cause of the injury, nor was there any dispute that the injury was caused by the fall, and it was held not improper for that reason to ask the doctor what he would say was the cause of the condition in which he found the knee. The same was true in the Roberts case, 229 id. 481, and in the Fuhry case, 239 id. 548, as the Supreme Court pointed out in Schlauder v. Chicago & So. Trac. Co., 253 id. 154. But in this case, as in the Schlauder case, there is a dispute as to the manner of the injury, and whether or not the fall was the cause of plaintiff's alleged subsequent condition, and under the cases cited above the ruling of the court in permitting Dr. Golden to give an opinion as to the ultimate fact was reversible error. See also Peefe v. Armour & Co., 258 id. 28; Lyons v. Chicago City Ry. Co., 258 id. 75; People v. Schultz, 230 id. 35.

The question of liability of the defendant in this case, including, as it does, the question of contributory negligence by the plaintiff, is involved in grave doubt. The only substantial injury claimed by the plaintiff is that she suffered from Pott's disease, or tubercular spondylitis. The claim that plaintiff had tubercular inflammation of the spine rests solely on the diagnosis of a young physician, Dr. Golden, whom she employed to treat her.



On the trial, defendant requested that plaintiff consent to an examination by a disinterested physician to be appointed by the court. With the consent of both parties, the court appointed as an examining physician Dr. John Kidlon. After a thorough examination of the plaintiff, Dr. Kidlon testified fully as to his findings, and completely rejected the diagnosis of tubercular inflammation of the spine and said there was no objective evidence of any injury to the spine, or of any disorder or abnormality therein. This testimony, in connection with the physical circumstances of the accident and the subsequent history of the case and the substantial recovery of the plaintiff make it seem impossible that the fall produced Pott's disease or that plaintiff suffered injury for which she should recover \$6500. We think the verdict on the record before us is excessive.

The judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.



385 - 19786.

In The Matter of the Estate of  
MATTHIAS HEMPELING, Deceased.

ANDREW HEMPELING, Executor of the  
Last Will of MATTHIAS HEMPELING, De-  
ceased,

Appellee,

vs.

EMILY HEMPELING, ANDREW HEMPELING,  
OSCAR GLICKNER, MATTHEW GORZYNSKI,  
SAMUEL THURMART, CHARLES FROSTEN and  
ANTON GLEN,

Appellants.

188 I.A. 542

APPEAL FROM

PROBATE COURT,

COOK COUNTY.

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This appeal brings up for review a decree of the Probate Court of Cook County, ordering a sale of the real estate of Matthias Hempfling, deceased, to pay debts of the widow's award. The right and power of the court to decree the sale of the real estate is challenged on the ground that there was sufficient money of the estate to pay the widow's award and debts proved up and allowed, and that the money left by the deceased should be first resorted to and used for that purpose.

The last will and testament of Matthias Hempfling, deceased, who died March 2, 1911, was proved and admitted to probate, and letters testamentary, dated June 13, 1911, were issued to Andrew Hempfling, executor named in the will.

Inasmuch as the decision of the court in question raised on this record turns on the provisions of the will, we quote them in full as follows:

"First - That after all my just debts and funeral expenses are paid, -

I give, devise and bequeath to my wife, Emily Hempfling, my 'Real Estate' and 'Bakery Business' at number 1701 West Erie Street, in the City of Chicago, Cook County of Cook and State of Illinois. Provides that said Emily Hempfling should not married again, or in the event of the death of said Emily Hempfling, my wife, the above mentioned real estate





And bakery business shall be held in trust for my two children, Andrew Hempfling and Helen Hempfling, minors, who reside with my wife, Emily Hempfling, at number 1741 West Erie Street, in the city of Chicago, County of Cook and State of Illinois, until they shall become of age, each to have share and one-half alike.

Second - I bequeath to my sister, Barbara Hempfling, residing in the city of Statteinak, Bavaria, Europe, the sum of Five Hundred Dollars.

Third - I bequeath to the Catholic Church at the town of Hohenberg, Germany, the sum of Five Hundred Dollars.

Fourth - I bequeath to Mexican Brothers of Chicago, in the city of Chicago and County of Cook and State of Illinois, the sum of Five Hundred Dollars.

Fifth - I have set aside Five Hundred Dollars for all expenses incurred in my last illness and death, the same moneys as I have bequeathed above is deposited in the First National Bank, making a total of Two Thousand Dollars, and the said First National Bank is located at the north-east corner of Dearborn and Monroe streets in the city of Chicago and the state of Illinois."

The inventory of the estate, approved July 7, 1911, showed the following property:

Personal Estate:

The executors and chattels in personal estate -  
 Invent. bill..... 141.00  
 Cash on hand in First Trust & Savings Bank,  
 pass book No. 116,593..... 2017.00  
 Total personal estate.....\$2158.00

Real Estate:

Lot 18, in subdivision of Block 1, in the  
 Canal Trustees subdiv. of sec. 7, T. 38,  
 N. R. 14, E. of 3rd E. M., which property  
 is improved with a store and dwelling  
 and is clear of incumbrance.

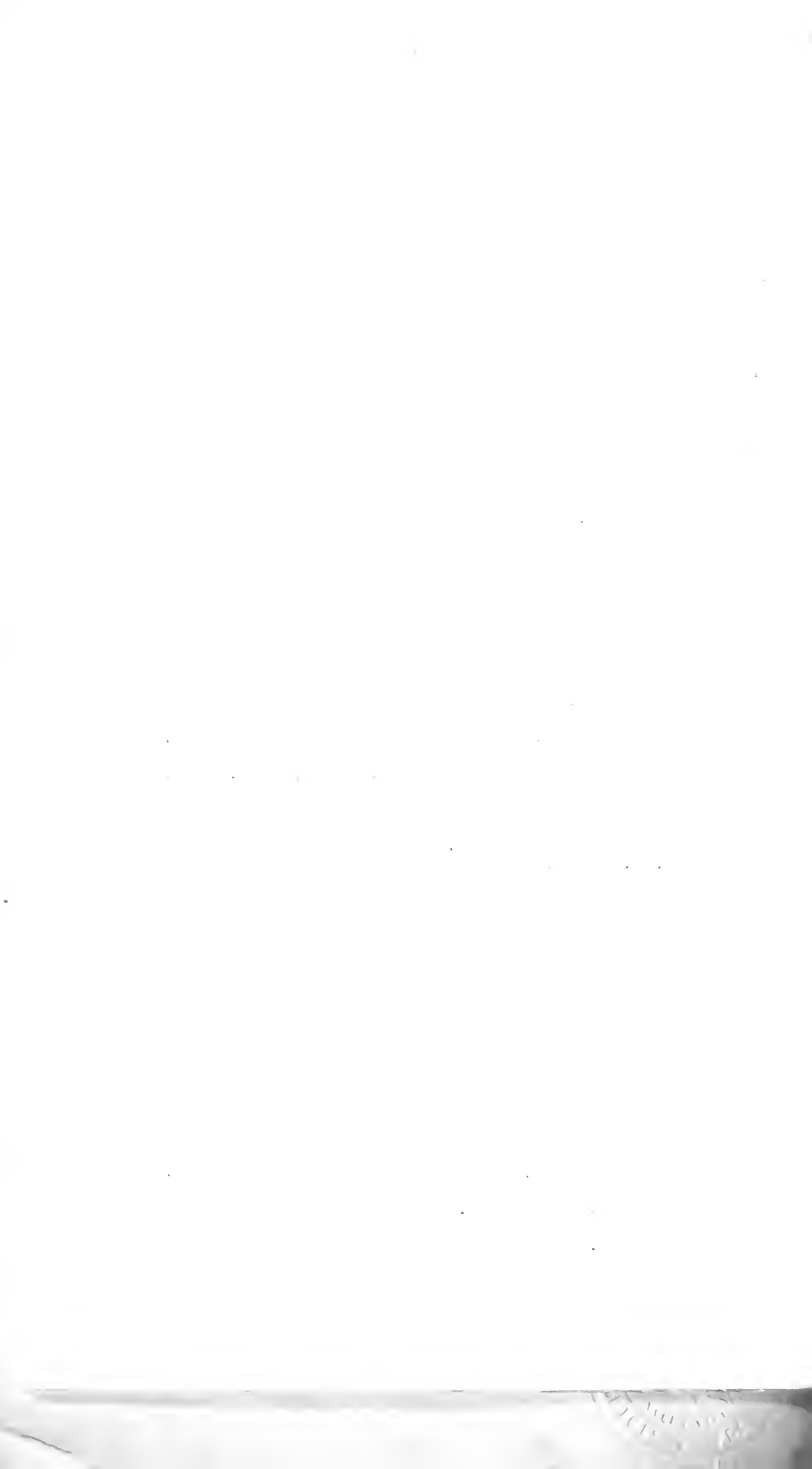
Wills' record, approved July 7, 1911, per.... 100.00

Just and true account, approved March 7,  
 1913, finds personal estate in per  
 invent. bill..... 141.00  
 Cash on hand from collection of account in  
 First National Bank..... 2000.00  
 Tot l.....\$2141.00

Debts:

Amount set aside for payment of specific  
 legacies under paragraphs 2, 3 and 4  
 of the last will and testament of  
 the testator..... 1567.84  
 Claim of Emily Hempfling, Will's record,  
 Class 2..... 1500.00  
 Claim of Charles Lunt, Will's record, Class 3..... 110.00  
 Claim of St. Boniface Church, Class 1..... 10.00  
 Claim of Emily Hempfling, Will's record, Class 4..... 100.00  
 Tot l.....\$3287.84

Deficiency of personal estate.....\$110.38



Appellants specific contentions are, (1) that the decree directing the sale of the real estate to pay the widow's award is wrong and erroneous; (2) that the executor should be directed to pay the award out of the money in his hands; and (3) that the bequest of money in the will be abated to that extent; and (4) that the decree should be reversed with directions accordingly.

In support of these contentions, counsel for appellants cite *Leaher v. Wirth*, 14 Ill. 38; *Cruce, Admr. v. Cruce et al.*, 21 id. 51; *Phelps v. Phelps*, 73 id. 546; and *Miller v. Miller*, 83 id. 467. These cases are not, in our opinion, applicable to the case presented in the record. The questions here involved are not the same questions discussed in the cases above cited. The facts here are different and call for the application of different principles of law.

Whether the Probate Court erred for want of power in ordering the sale of real estate to pay debts while there was personalty in the estate depends upon the construction of the will. Ordinarily, personal property is the primary fund for the payment of debts and general legacies, unless a contrary intention on the part of the testator satisfactorily appears. If, however, from the whole will, it appears by express language, or by necessary implication, that a particular portion of the estate is to be the primary fund for the payment of the debts, the remainder of the estate will be exonerated from the burden, (*Brown v. Saathoff*, 139 Ill. App. 617). A direction in the will, that a devise of real estate shall be taken subject to the payment of debts, if the property devised is adequate for that purpose, will exonerate the personal estate. (*Underhill on Wills*, Sections 375 and 360).

In *Harris v. Douglas*, 64 Ill. 475, it was held:

"The principle deducible from the authorities in this country is that where it clearly appears to have been the



intention of the testator to charge his real estate, to the exclusion of his personal property, the words in the residuary clause of the will, 'After the payment of my debts', will be sufficient for that purpose. This is the common law rule as modified by statute in most of the American states."

The first clause of the will here involved reads:

"That after all my just debts and funeral expenses are paid, I give, devise and bequeath to my wife, Emily Henrling, my real estate and bakery business, at" etc., giving the street number in Chicago. Under the authorities cited and many others, this language clearly conveys the testator's intention to charge his real estate with the payment of his debts. But, the following clauses of his will, in which he specifically disposes of all his money in the bank, makes his intention clear beyond the possibility of question. (*Virgine v. Virgine*, 65 N. Y. Eq. 417; *Fenwick v. Chacean*, 9 Pet. 461; *McCullow v. Chidester*, 53 Ill. 477).

The testator at the time of his death owned a piece of real estate valued in the petition at about \$10,000. This valuation is not denied in the record or questioned. The testator, therefore, did not intend to deprive his widow of her award. This he could not do. He intended, as we gather from the will, to charge his real estate with the payment of the award and his few small debts, knowing that the real estate was more than sufficient to pay them and the costs of administration.

There is no error in the decree and it is affirmed.

APPROVED.



Term, 1911, 13.  
229 - 20153.

THE PEOPLE OF THE STATE OF  
ILLINOIS,

Defendant in Error,

vs.

GUST ANDERSON,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

188 I.A. 550

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This writ of error is brought to reverse a judgment of the Municipal Court of Chicago, finding Gust Anderson, the plaintiff in error, guilty of an assault and battery on Jonas Olson, and fining him \$100 and costs, and committing him to the House of Correction of the city of Chicago until the fine and costs are paid or are worked out at the rate of \$1.50 per day.

The first error relied upon is that the name of the injured party is not proved by the record. We think this point is not borne out by the record. Anna Olson made the complaint, charging that the plaintiff in error maliciously made an assault upon Jonas Olson. The evidence in the record shows that Jonas Olson was the husband of the complaining witness and the party who was struck and injured.

The second ground of error is that the court had no authority to compel plaintiff in error to pay money to Jonas Olson. It is a sufficient answer to this contention to say that the record does not show that the court compelled plaintiff in error to pay money to Olson. The court, in some talk during the trial, attempted to induce plaintiff in error to pay Olson some money for his doctor's bill and attorney's fees as an equitable settlement of the affair; but this proposition was rejected by plaintiff in error and the court said no more about it. The evidence sustains the judgment, which is affirmed.

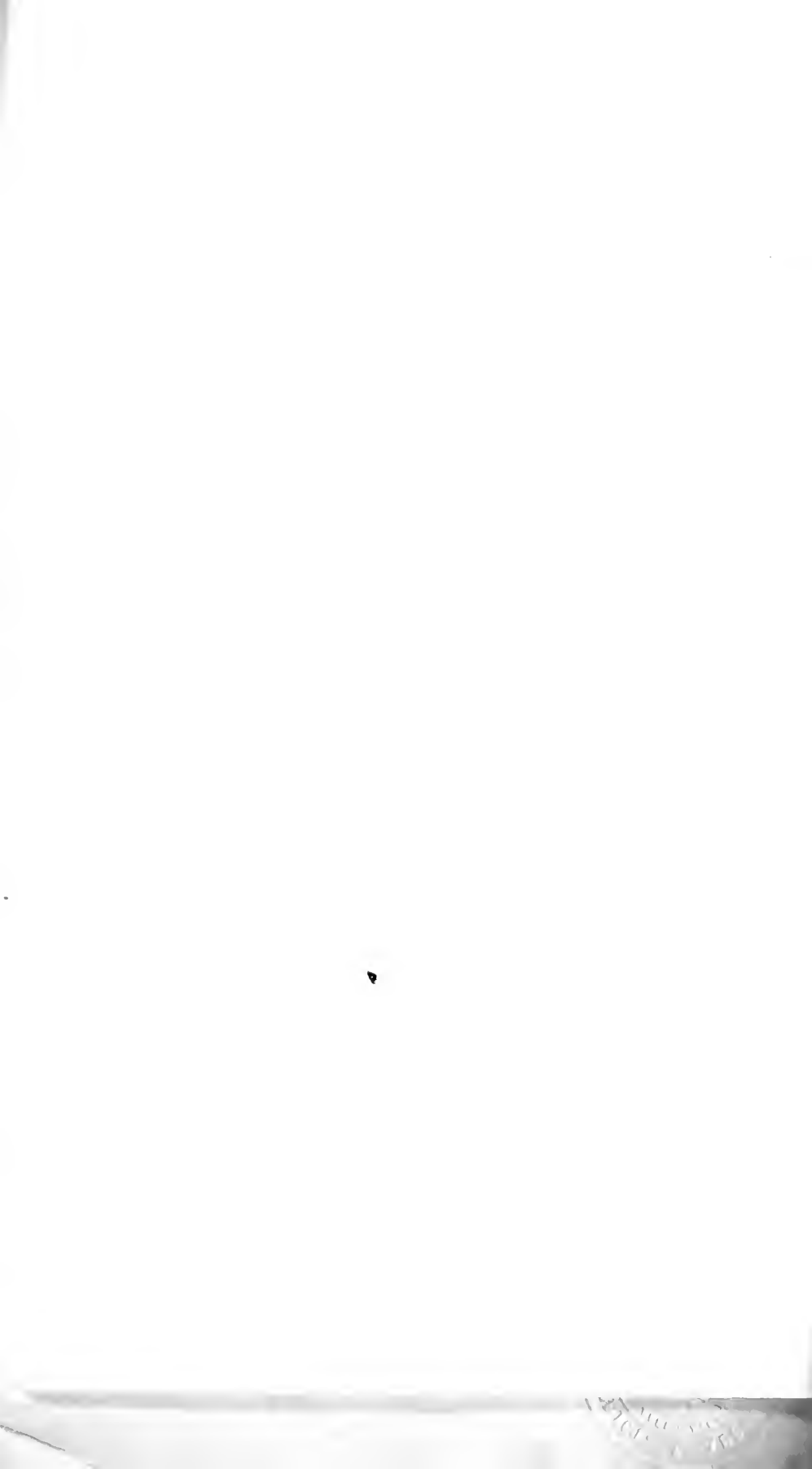
AFFIRMED.





-2-

Mr. Justice Barnes:- I think the record fails to identify the person assaulted.



380 - 18847.

CHARLES CHAPMAN,

vs.

CHARLES T. RICHEY et al.,  
On Appeal of  
HERBERT W. DUNCANSON,  
Appellant,

vs.

CHICAGO TITLE & TRUST COM-  
PANY, Trustees, et al.,  
Appellees.)

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

**188 I.A. 531**

MR. PRESIDING JUSTICE BAUME  
DELIVERED THE OPINION OF THE COURT.

On October 30, 1905, William J. Lukens, the owner of certain premises located on the corner of Evanston Avenue and Ainsley street, Chicago, concluded negotiations with Herbert W. Duncanson for the sale of the same for \$6,400, \$3,200 to be paid in cash and the balance by two notes of \$1,600 each, payable in two and three years, to be secured by a mortgage upon the premises subject to a first mortgage bond issue of \$40,000 to be given for the improvement of the premises by the erection of an apartment building thereon, and at the instance of Duncanson the premises were conveyed to Charles T. Richey, an employee of Duncanson, who purports to have been engaged in the building business. This deed was acknowledged January 31, 1906, and recorded April 5, 1906. On January 26, 1906, Duncanson arranged with the Jennings Real Estate Loan Co., hereinafter called the Loan Company, for the negotiation by it of a \$40,000 bond issue to be secured by a first mortgage on the premises and the building to be constructed thereon, and Richey then executed 200 bonds, numbers 1 to 150 for \$100 each and numbers 151 to 200 for \$500 each, two of such bonds numbered 1 to 96 maturing each month beginning



January 26, 1907, and the remainder of such bonds maturing January 26, 1911. Richey then also executed a trust deed on said premises to the Chicago Title & Trust Company to secure the payment of said bond issue, which trust deed was acknowledged February 9, 1906, and recorded February 14, 1906. On January 27, 1906, Duncanson, acting for Richey as the owner of the premises, contracted for work and material for the construction of said apartment building on said premises with various parties as follows: A. Beckmann & Company, for heating plant, \$1,953; Silverberg Brothers for glass and glazing, \$340; C. W. Fellgren & Son for carpenter work, \$10,000; A. J. Fisher Plumbing Company for plumbing work, \$3,490; Charles Olsen for painting, \$1,500; D. J. Ingram & Company for electrical work, \$600. On January 31, 1906, a like contract was made with Charles Chapman for the mason work for \$9,750. On the same day C. W. Fellgren & Son, contractors for the carpenter work, contracted with Bauer, Peterson & Co. for certain lumber for \$3,750, and on February 5, 1906, Charles H. Neare & Co. contracted with said Fellgren & Son to furnish the mill work for \$3,000. During the progress of the work Charles W. Fellgren contracted with Emma Krouger for some hardware for \$350. ( Between April 6th and June 8th, 1906, at the instance of Duncanson, a partial payment out of the proceeds of the bond issue was made to each of several contractors) as follows: April 13th to A. Beckmann & Co. \$1,000; April 24th to D. J. Ingram & Co. \$500; April 26th to A. J. Fisher Plumbing Co. \$1,500; April 27th to Charles Chapman \$3,000; May 25th to C. W. Fellgren & Son \$300; May 25th to Charles Olsen \$300. Upon the payment of said accounts each of said parties signed a receipt therefor and a waiver of lien, which, except as to date, amount and designation of work, is identical with the one signed by Charles Chapman, as follows:



"Form 4606 WAIVER.

\$5,000.00

Chicago, April 27, 1906.

Received of Charles T. Richey Five Thousand and No/100 Dollars, to apply on mason contract work Contract on building S. F. Cor. Evanston and Alnsley. The undersigned for and in consideration of One Dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged, does hereby waive and release any and all claims or liens on said building under any Acts in relation to mechanics' liens, approved or in force, on account of labor or materials, or both, furnished or which may be furnished by the undersigned for said premises.

"HAR. CHAPMAN, Contractor."

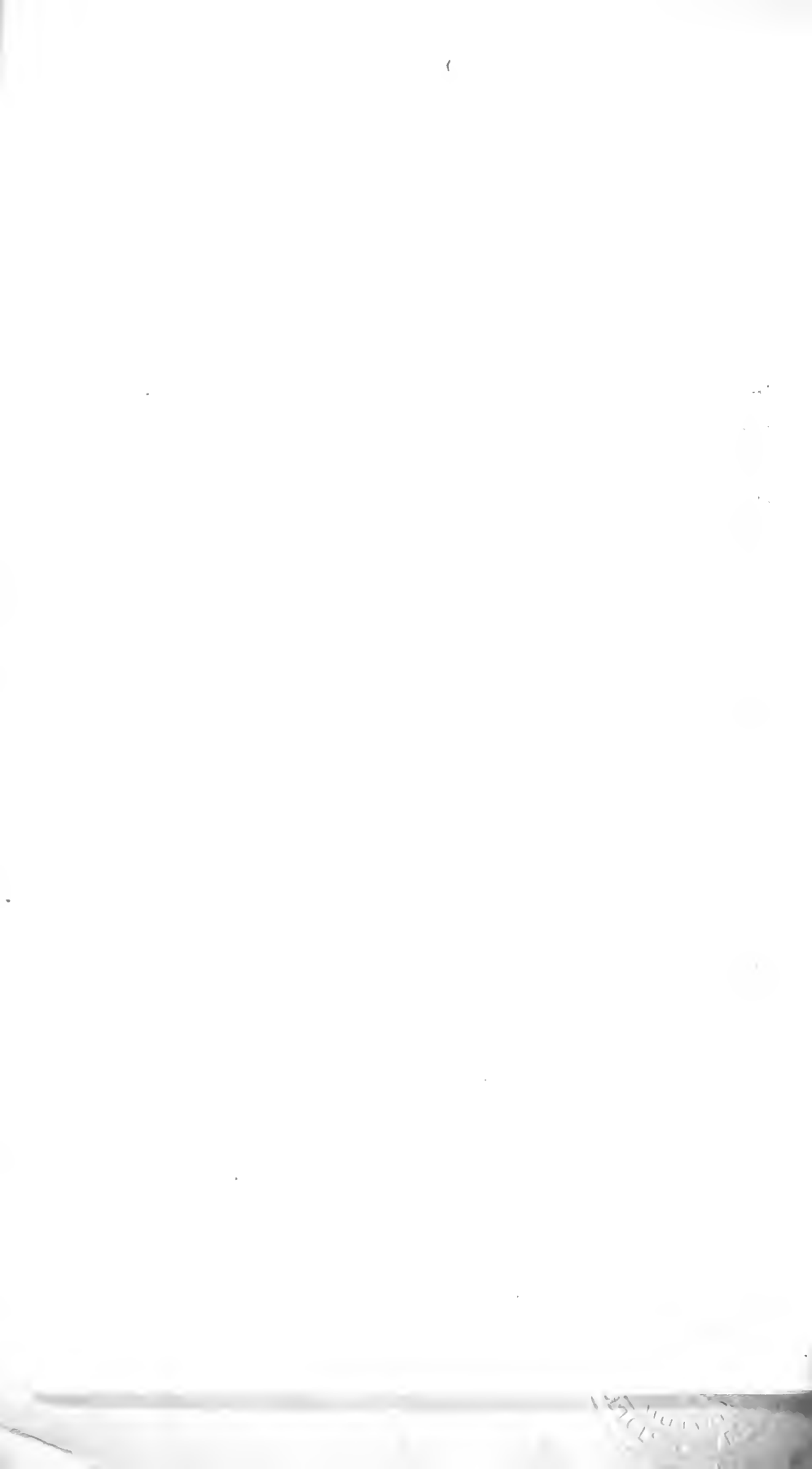
On June 8, 1906, a considerable portion, being approximately \$11,000 of the bond issue of \$40,000, remained unexpended in the hands of the Loan Company, which amount Duncanson and Richey directed said Loan Company to pay out upon the orders of one Edward Bittner, with whom one Bailey, acting for Duncanson, had negotiated an exchange of the property here involved for some property claimed to be owned by said Bittner, and by deed dated April 28, 1906, recorded and delivered June 8, 1906, Richey conveyed said property to Bittner. Before the delivery of the deeds by Bittner of the property claimed to be owned by him, Duncanson, acting for himself, Bailey and Richey, on July 17, 1906, negotiated the transaction with Bittner for alleged false representations and for partial failure of consideration, and filed a claim for a vendor's lien against the property in question for a pretended equity therein of \$9,400, and on the same day Bittner conveyed the property in question to Anna K. Brooks. Subsequent conveyances of the property by Anna K. Brooks and her grantees are unimportant.

On August 7, 1906, Charles Chapman filed his bill in the Superior Court to enforce a mechanics' lien for the balance claimed to be due on his contract for labor and material and also then filed his motion for the appointment of a receiver for the property. On August 13, 1906, while the motion for





the appointment of a receiver was pending, Edwin B. Jennings, the owner and holder of \$9,000 of the bonds secured by the trust deed on the property, being more than 80% of the total bond issue, notified the Chicago Title and Trust Co. of his ownership of said bonds and that by reason of the default of the maker in the terms of said trust deed in failing to pay the general taxes for the year 1905, prior to May 1, 1906, and the default of the maker in not discharging certain liens of mechanics and material men upon the premises, and by the filing of the bill for a mechanics' lien by Charles Chapman, and default of the maker in failing to complete and render tenantable the building within a reasonable time, he elected to declare the whole amount of principal and interest of the bonds secured by said trust deed immediately due and payable, and requested the Chicago Title & Trust Co. to immediately institute foreclosure proceedings. On August 14, 1906, in response to said request, the Chicago Title & Trust Co. filed its bill in the Superior Court to foreclose the loan of trust. Thereafter a receiver for the property was appointed by the court, and the two causes were consolidated. The several lien claimants heretofore mentioned, with others claiming mechanics' liens on the property, filed their answers and also their intervening petitions to enforce such liens, and a large number of bond holders answered the bill setting up ownership of their respective bonds. Cora E. Lukens, as executrix of the last will and testament of William J. Lukens, filed her answer setting up her ownership of the second mortgage. Emerson and Richey filed their answer denying that there had been any default in any of the terms of the trust deed; averring that the foreclosure was not brought in good faith, but for the purpose of involving the property in litigation and confusion to cover up a shortage of \$8,617.60 in the loan; averring that all mechanics' lien claimants had waived their liens, and that the



claims of certain lien claimants had not been filed of record for thirty days at the time of the filing of the bill; averring the sale of the property to Rittner and the failure of consideration and asking for a vendor's lien thereon for \$9,400, subject to the Lukens' mortgage; attacks the right of certain claimants of certain bonds to recover thereon, and asks that a third mortgage on the property executed by Rittner be declared void and ordered cancelled. Richey and Duncanson also filed their cross-bill, wherein they prayed for the same relief asked by them in their answer. This cross bill was subsequently amended by setting forth that the record title to the property was in Richey, but that Duncanson was the real beneficial owner thereof and that Richey had conveyed to Duncanson all his right, title and interest in the property and in certain colored funds in the hands of the loan company and of one J. F. Elliott Jennings. On January 31, 1910, the Chicago Title & Trust Co. filed its amended and supplemental bill, wherein it set forth inter alia that since the filing of the original bill certain bonds had matured and default had been made in the payment thereof and the interest coupons thereon and that certain holders of said bonds had requested the trustees to institute foreclosure proceedings either by original or supplemental bill. Said amended and supplemental bill was answered by Richey and Duncanson, and the consolidated cause was then referred to a master to take and report the proofs with his findings. On July 1, 1910, a decree was entered in accordance with the findings of the master. The decree finds that default had been in the terms of the trust deed in that the taxes for 1905, were not paid before May 1, 1906, and also in that such taxes had been permitted to attach to the premises, and that such default had continued for more than 30 days prior to the filing of the original bill to foreclose the trust deed; that the right to foreclose said trust deed also accrued by reason of the defaults



alleged in the amended and supplemental bill; that there was due the Chicago Title & Trust Co. for its certain proper disbursements \$210.07, also for its solicitor's fees \$5,000, and for its services \$250; that there was due to the several designated bond-holders for principal and interest upon their bonds, including the sum of \$808.03 to the United States Trust Co., the several amounts therein set forth; that each and all of said bonds were an equal lien upon the premises and were entitled to be paid next after the payment of mechanics' liens, taxed costs and amounts found due the Chicago Title & Trust Co. for its disbursements, expenses and solicitor's fees; that the following several mechanics' lien claimants were entitled to mechanics' liens upon the premises for the several amounts, as follows: Charles Chumma, whose lien attached January 31, 1906, \$6,057.25, including interest at 5% from July 15, 1906; William L. Barnum, Jr., an assignee of Charles Olsen, whose lien attached January 27, 1906, \$779.26; A. Deppan & Co., whose lien attached January 27, 1906, \$261.46; E. J. Ingram & Co., whose lien attached January 27, 1906, \$322.79; A. J. Fisher Plumbing Co., whose lien attached January 27, 1906, \$3,487.75; American Trust & Savings Bank, Trustee in bankruptcy of Silverberg Bros., whose lien attached January 27, 1906, \$451.24; Charles H. Meare & Co., whose lien attached January 27, 1906, \$3,569.65, including interest at 5% from July 15, 1906; Bader, Peterson & Co., whose lien attached January 27, 1906, \$1,395.00, including interest at 5% from July 1, 1906; Anna Krueger, whose lien attached January 27, 1906, \$466.77, including interest at 5% from July 15, 1906; that there was due upon the Lukens second mortgage \$4,705.46; that there was due C. F. Waltzer Lumber Co., \$612.62, upon its judgment against Edward A. Bittner.

The cross bill of Richey and Dickinson was dismissed for want of equity, and the decree further provided that upon



default in payment within 10 days of the several amounts as therein adjudged, the premises be sold and the proceeds divided in the order of priority as therein provided.

This appeal from said decrees is prosecuted by Herbert W. Sanderson, and appellee, Chicago Title & Trust Co., has assigned cross errors and joined with appellant in attacking the decrees in so far as it established the right of the several mechanics' lien claimants to mechanics' liens upon the premises.

It is insisted that the original bill for foreclosure was prematurely filed on August 14, 1908, because there was then no continuing default for thirty days in any of the covenants of the trust deed.

Article 3 of the trust deed provides, in part, as follows:

"Said party of the first part further covenants and agrees to pay prior to the first day of May in each year all taxes and assessments on said premises at such time due and payable, and not to suffer any part of said premises to be sold for any tax or assessment whatsoever, or suffer any mechanic's lien to attach to said premises\*\*\*\*, and that they will complete and render tenantable within a reasonable time, free from all liens of every nature, and all buildings now being erected or which may hereafter be erected thereon."

Article 4 provides that in the event of the failure of the mortgagor to pay said taxes and assessments or to complete and render tenantable within a reasonable time any building being erected on the premises, then the trustee or the holder of any of the bonds, may at its, his or their option, pay such taxes or assessments, or discharge or purchase any tax lien or title on said premises, or settle any lien of any mechanic or materialman, or complete said building, or make such repairs, and all moneys so paid with interest at 7% per annum from date of payment, shall become so much additional indebtedness secured by the trust deed.





Article 7 provides that "in case of default in the performance of any covenant or agreement herein made by the party of the first part, or their heirs, executors, administrators or assigns, and such default continuing for thirty (30) days, then the whole of said principal sum hereby secured shall at once (without notice thereof to said party of the first part, or their heirs, legal representatives or assigns), at the option of the holder or holders of twenty per cent (20%) of the bonds herein described then unpaid, become due and payable.

As heretofore stated, the original bill for foreclosure charged default by the maker continuing for thirty days prior to the filing of said bill in the following particulars, 1st, payment of the general taxes for the year 1906 prior to May 1, 1906; 2nd, failure to pay and discharge certain liens of mechanics and material men upon the premises; 3rd, permitting claims of mechanics or material men to accrue against said premises; 4th, failure to complete and render tenantable the building, within a reasonable time. An analytical consideration of each of the numerous questions raised by counsel and exhaustively argued in their briefs, would unduly extend this opinion. We have given each and every question raised deliberate consideration, and shall content ourselves with a brief statement of our conclusions upon only such questions as affect the result of the controversy.

It is admitted that the mortgagor failed prior to the first day of May, 1906, to pay the taxes for the year 1906, and that the default of the mortgagor in that particular continued for 30 days prior to the filing of the original bill, but it is urged that the agreement of the mortgagor, "to pay prior to the first day of May in each year all taxes and assessments on said premises at such time due and payable, and not to suffer any part of said premises to be sold for any tax or assessment whatsoever", is one indivisible and inseparable



covenant, and that there could be no breach of the covenant until there had been a sale of the property for the tax or assessment.

The paramount rule for the interpretation of covenants is to so expound them as to give effect to the actual intent of the parties, collected not from a single clause, but from the entire context. Consolidated Coal Co. v. Peers, 150 Ill., 344. The application of this rule in the interpretation of the several covenants in the trust deed compels us to the conclusion that the covenant to pay taxes is a separable, independent covenant, for a breach of which a default accrued, and that it was not necessary that the mortgagor should have suffered the premises to be sold for taxes in order that the option of the holder or holders of the requisite amount of bonds might be exercised to declare the entire issue of bonds due and payable. The failure of the mortgagor to pay the taxes for 1905, prior to May 1, 1906, incurred a penalty which became an added burden upon the premises superior to the lien of the trust deed. The covenant to pay taxes prior to May 1st, is treated as a separate covenant in the provision in Article 4, whereby the trustee or bond holder or holders are authorized to pay the taxes in the event of the failure of the mortgagor to pay the same. Whether or not defaults accrued in either or all of the other particulars relied upon by appellee, Chicago Title & Trust Co., it is not now necessary to consider and determine, but the fact that we have refrained from discussing other grounds of default relied upon, and have predicated the right to file the original bill upon the one ground stated, may not improperly be construed as suggesting the conclusion by us that such other grounds are untenable.

It is urged that the allowance to the trustee of \$5,000 for its solicitor's fees is unauthorized and excessive.



An allowance to the trustee of its reasonable solicitor's fees is expressly authorized by the terms of the trust deed. A consideration, however, of the evidence bearing upon that question, and of the necessary services performed by the solicitor for the trustee, as shown by the record, convinces us that an allowance of \$5,000 is excessive. For the necessary services performed and responsibility assumed by the solicitor for the trustee in this case he will be amply compensated by an allowance of \$3,000, and upon the remainder of the cause the decree will so provide.

There is no warrant for an allowance of \$250, or any other sum, to the trustee for the use of its name in this proceeding. Some service and responsibility devolved upon the trustee for which it will be amply compensated by an allowance of \$500.

The defendant, Edwin E. Jennings, files his answer to the bill wherein he set forth that he was the owner of certain bonds aggregating \$9,000, which amount, together with interest thereon at 7 1/2 per annum from January 26, 1907, was still due and unpaid. The decree erroneously allows to said defendant, Jennings, interest on said bonds from June 26, 1906. It is elementary that a party can not avail himself of a ground of complaint or defense not set up in a pleading, even though it appears in the evidence. Burns Lumber Co. v. Reynolds Co., 148 Ill. App., 353, and cases there cited. Interest should be allowed only from January 26th, 1907.

The decree allows to the United States Trust Co., as the owner and holder of bonds 119 and 131, \$838.08 for principal and interest on said bonds. Said United States Trust Co. has failed to enter its appearance in this court and we are unable to find any evidence in the record which supports the decree in that particular.



The claims of each and all of the mechanics' lien claimants, except that of Silverberg Bros. for \$451.34, allowed to the American Trust & Savings Bank, as trustee in bankruptcy of said claimants, are contested by both the Chicago Title & Trust Company, trustee, and appellant.

As to all of said lien claimants, with the exception of Silverberg Brothers and Charles H. Neare & Company, it is insisted that by the execution by them or their principal contractors of receipts in the form heretofore set forth in the statement of the case, they are barred from asserting their claims for mechanics' liens upon the premises.

It is essential to every contract that it be based upon a good consideration. McLean v. McLean, 74 Ill., 134. In Bonney v. Bonney, 237 Ill., 452, it is said (461):

"The principal is elementary that an instrument affecting the rights of property, executed without consideration, has no binding force or effect in law and may be avoided as between the parties."

It is said that an agreement to waive a lien requires no consideration to support it, but no authority is cited which sustains such statement. That a consideration is necessary to support the waiver of a lien is clearly intimated in Faulsen v. Munske, 126 Ill., 72. Undoubtedly a lien may be waived in an original contract for labor and material and in Kelly v. Johnson, 251 Ill., 135, it is said (139):

"Clearly, if a lien can be waived in the original contract, it can be subsequently waived, for a valuable consideration, as between the original parties."

In 27 Cyc., 265, it is said: "A waiver of a mechanic's lien must be supported by a consideration in order to be effective." Again, at page 265, the authors say: "A release of a mechanic's lien must, in order to be effective, be sustained upon a consideration." The cases cited support the text.





The same or similar statements are made in Rockel on Mechanic's Liens, sec. 189; Phillips on Mechanic's Liens, 474; and Boisot on Mechanic's Liens, sec. 733.

The payments made to the several lien claimants, when they signed the receipts and pretended waivers in question, were partial payments merely, or payments upon account for work and material theretofore performed and furnished by them under their several contracts. There was more money then due them than they received, and the only consideration for the pretended waivers was the money then paid to them. There was no bona fide dispute between the parties, the compromise of which would have been a good consideration. The absence of a consideration to support the pretended waivers rests on the ground that the agreement for the discharge of an entire debt by its part payment is without consideration. Jackson v. Security Life Ins. Co., 233 Ill., 161.

In Turner v. Brenckle, 249 Ill., 394, the waiver in question appears to have been executed by the lien claimant in connection with or as forming a part of the original contract, or at least before any liability had accrued under the terms of the contract in favor of the contractor and against the owner.

In Kelly v. Johnson, 251 Ill., 135, the original contract between the contractor and the owners was subsequently modified by the contractor executing a waiver upon the payment to him of \$5,000, which amount it does not appear was then due and owing to him under the terms of the original contract.

We concur in the conclusion arrived at by the master and the chancellor that the waivers here involved are ineffective for want of consideration.

As to the claimants, Bauer, Peterson & Co. and Zama Kreuger, the receipt and waiver signed by their principal contractors, C. W. Fellgren & Son, would be ineffective, even if valid, because such waiver was executed subsequent to the



contracts between said claimants and said principal contractors.

Kelly v. Johnson, supra.

That the claim of appellant that the instruments signed by the lien claimants were effective to waive their liens was an afterthought is evident from an inspection of a letter written by appellant to the loan company on June 8, 1906, as follows:

"This is to notify you that the building at the northwest corner of Evanston Avenue and Ainalie Street on which you made a loan of \$10,000 has been this day sold to Edward Bittner, and the balance of \$11,563.35 left in the loan will be paid out by Mr. Bittner in the discharge of the obligations on this property. You will take the necessary statements and waivers on the payment of this fund, as heretofore, to protect Mr. Richey in the matter."

The decree is erroneous in so far as it allows interest to the lien claimants, Charles Chapman and E. L. Burum, Jr., assignees of Charles Olsen, from the time of the completion of the work by them on July 25, 1906, instead of from the time of the filing of their petitions on August 7, 1906, and November 3, 1906, respectively, because said lien claimants in and by their petitions failed to ask for interest from the date of the completion of the work, or failed to demand an amount sufficient to authorize an allowance of interest from said date.

Walsh v. North American Cold Storage Co., 360 Ill., 332.

It is finally urged by appellant that the chancellor improperly dismissed for want of equity the cross bill filed by appellant and Richey to establish in them a vendor's lien upon the property for \$9,400.

The cross bill presents no meritorious equity; there is no substantive evidence in the records to support it, and it was properly dismissed. Appellant never invested a dollar in the property. He caused the title to the property to be taken in the name of his employee's, who was financially irresponsible. He caused it to be burdened with incumbrances and



liens beyond its reasonable ability to carry, and so contrived and manipulated the title as to avoid personal liability for any indebtedness or any loss to himself, arising out of the venture. His efforts appear to have been directed to foisting the property, with all the indebtedness incident to it, upon others by means of an exchange, whereby he might secure a substantial pecuniary advantage to himself.

The decree is affirmed in part and reversed in part, and the cause is remanded to the Superior Court with directions to enter a decree in conformity with the views here expressed.

The costs of this appeal will be taxed, as follows: Three-fifths against appellant; one-fifth against the Chicago Title & Trust Co.; one-tenth against the United States Trust Company and one-tenth against Edwin F. Jennings.

DECREE AFFIRMED IN PART; REVERSED  
IN PART AND REMANDED WITH DIRECTIONS.



393 - 18860.

JACOB PIANCO, a minor, by his next  
friend, SARAH PIANCO,

Appellee,

vs.

HERBERT L. JOSEPH & COMPANY, a  
corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

188 I.A. 555

MR. PRESIDING JUSTICE BAUMF  
DELIVERED THE OPINION OF THE COURT.

This is an action of trespass on the case brought by appellee, Jacob Pianco, a minor, by his next friend, against appellant, Herbert L. Joseph & Co., a corporation, to recover damages for alleged malicious prosecution, wherein a trial in the Circuit Court resulted in a verdict and judgment against appellant for \$500.

It is urged that the verdict is against the manifest weight of the evidence; that the trial court erred in giving and refusing certain instructions; and that the damages are grossly excessive.

On October 4, 1907, appellee, who was then between 16 and 17 years of age, purchased from appellant a diamond ring for \$63, payable, as the instrument he then executed recites, \$8 down and the balance in weekly installments of \$2. On February 20, 1908, appellee, having in the meantime paid the several accruing installments on the purchase price of the ring, returned the same to appellant and purchased a larger ring priced to him at \$225, upon which he paid \$30 down and executed a contract of purchase therefor, whereby he agreed to pay the balance, \$195, in weekly installments of \$4. He also then executed a blank form of chattel mortgage, which appellant thereafter filled in by inserting a general description of the ring and a consideration therefor of \$195, payable in weekly





installments of \$4, with interest at 6% per annum. Appellee having made no further payments upon the purchase price of the ring, appellant on March 4, 1910, procured an information to be filed in the Municipal Court, charging that on or about May 20, 1908, during the existence of the chattel mortgage lien thereon, appellee, without having the consent of appellant, did then and there unlawfully and feloniously conceal, remove and sell said diamond ring, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois. Appellee was arrested under a warrant issued out of the Municipal Court upon said information, and was held in custody for about six hours, when he was admitted to bail. Thereafter, upon a trial in the Municipal Court of the offense charged in the information, appellee was acquitted and finally discharged.

Appellant says that the acquittal and discharge of appellee in the criminal proceeding were predicated upon his defense of infancy, whereby the instrument relied upon as a valid chattel mortgage, was, at his election, rendered void and unenforceable, and that the verdict and judgment in the present case are predicated upon the same ground. The portion of the record of the criminal proceeding offered in evidence in this case does not disclose the grounds upon which appellee was acquitted of the offense charged, and the fact of appellee's infancy is only material in this case upon the issue of probable cause, in so far as appellant is chargeable with knowledge of such infancy.

Appellee testified that when he purchased the first ring he informed appellant's salesman that he was sixteen and one-half years of age. Two witnesses called by appellant testified that appellee then stated he was twenty-one years of age, and one witness, whose duty it was to investigate the credit of intending purchasers of jewelry, testified that he-



fore the first ring was delivered to appellee, he called at appellee's place of residence and was there informed by appellee's mother that appellee was of age and could do as he chose about entering into a contract of purchase for a ring. The mother of appellee, when called as a witness in rebuttal, admitted that a man employed by appellant had come to her house and that she had a conversation with him, but denied she told the man that her son was of age. The contract of purchase of the first ring, which is signed by appellee, states his age to be twenty-one years. Upon this issue the decided weight of the evidence tends to show that appellant dealt with appellee in the belief in good faith that he was of full age and competent to contract.

Appellee testified that after he signed the papers in blank, on Saturday evening, for the purchase of the second ring, he was permitted by appellant to take the ring for the purpose of ascertaining what it was worth; that he had the ring priced and returned with it to appellant's place of business on the Monday following, and told appellant's salesman that the ring was worth only \$60 or \$75, and that he wanted his money back; that he then offered to return the ring to appellant; that appellant's salesman told him the papers were all filled out and he could not get his money back; that the next thing that happened was about two years after, when he was taken out of bed and arrested. Witnesses called by appellant denied that appellee ever returned to appellant's place of business after he procured the ring, and it is conceded that appellee thereafter neither paid nor offered to pay any further installments on the purchase price of the ring. We are not impressed with the truthfulness of appellee's statement that he was permitted by appellant to take the ring away for two or three days for the purpose of having it priced before he should be held to have purchased it. The statement



that a dealer in valuable jewels for sale on the installment plan conducted his business in such manner taxes our credulity.

It is clearly established by the evidence, indeed there is no countervailing evidence, that several persons employed by appellant as tracers made frequent and repeated efforts during the two years following the delivery of the ring to appellee and before his arrest, to locate appellee, and that their efforts in that regard were fruitless; that upon occasions when they went to his place of residence, they were informed that he was in New York, but his address was not known, or that his whereabouts was unknown.

The uncontradicted testimony of Frank Kline, the police officer who served the warrant upon appellee, is substantially as follows: "In May, 1910, I received a warrant authorizing the arrest of one Jacob Lianco. I looked for him about two weeks. I went to his house on Fernitage avenue near Twelfth street. I asked his mother if Jacob was home. She said, 'No' that he was out of town. I went back there two or three times. I arrested him on a Sunday morning. I went into his house, and he wasn't there, so I went next door into his brother-in-law's house. I went in the rear way and went in two or three rooms and did not see him, and in the front room there were folding doors and they were closed and hooked. They didn't want to let me in there, but I unhooked the door and I went in and I found him lying on a cot."

Appellee admitted that after he procured the ring from appellant he had the diamond re-set in a smaller setting.

In Kitchinson v. Cross, 58 Ill., 366, it is said:

"The gist of the action for malicious prosecution is, that the prosecutor acted without probable cause. If there is no malice, or if there is probable cause, the action will not lie. Malice, without want of probable cause, will not support the action; both must concur, though malice may be inferred from want of probable cause. Leidig v. Rawson,



1 Scam. 272; Jacks v. Simpson, 13 Ill. 702; Ross v. Innis, supra.

A reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged, constitutes probable cause under the law. Ross v. Innis, 35 Ill., 487; Seigel, Cooper & Co. v. Tuebbecke, 133 Ill. App., 312. "The issue for the jury is not the guilt of the plaintiff." Anderson v. Friend, 26 Ill., 135.

A careful consideration of the evidence leads us to conclude that the verdict of the jury upon the issue of probable cause, that is, the finding that appellant instituted the criminal prosecution in question against appellee without probable cause, is contrary to the manifest weight of the evidence.

The verdict may have been prompted by error in the instructions.

The first instruction given at the instance of appellee is erroneous in that it fails to require the jury to find the facts upon which the announcement of law is there predicated, by a preponderance of the evidence in the case. The second instruction is abstract in form, and is so drafted that it was calculated to mislead the jury. The third instruction which relates to the measure of damages includes certain elements not supported by any evidence in the case, and is also faulty in failing to limit the jury to the consideration of such proper elements of damage as are shown by the evidence in the case.

The court did not err in refusing certain instructions tendered by appellant.

The thirtieth instruction refused was covered by other instructions given at the instance of appellant. If a





party tenders two or more instructions embodying the same legal principle, he cannot be heard to complain if the court selects and gives to the jury the instruction which is least favorable to him.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.



October 1, 1925, Ill.

409 - 18876.

JOHN F. DEVINE, Administrator of the  
Estate of JAMES DWYER, Deceased,  
Appellee,  
vs.  
CHICAGO CITY RAILWAY COMPANY and  
CALUMET AND SOUTH CHICAGO RAILWAY CO.,  
Appellants.

APPEAL FROM  
SUPERIOR COURT,  
COOK COUNTY.  
**188 I.A. 558**

MR. PRESIDING JUSTICE BAUME  
DELIVERED THE OPINION OF THE COURT.

This is a suit by appellee against appellants to recover damages for wrongfully causing the death of appellee's intestate, James Dwyer, wherein a trial in the Superior Court resulted in a verdict and judgment against appellants for \$5,000.

The case was submitted to the jury upon the first, second and third counts of the declaration.

The first count alleges that appellants were in possession of certain street railway tracks on South Chicago avenue whereon they were engaged in operating electric street cars; that deceased was employed by appellant, Chicago City Railway Company, as a track laborer and was engaged in laying bricks between the said tracks on South Chicago avenue; that appellants through their agents and servants, were then and there operating an electric car in a northerly direction along and upon said South Chicago avenue at a point about midway between 69th street and 71st street; that appellants and each of them, so carelessly, negligently and improperly drove, propelled and managed the said car at such a high and dangerous rate of speed, to-wit, the rate of 10 miles per hour, that the car aforesaid was, by reason of the negligence of appellants in operating the same, at such a high and dangerous rate of speed, driven with great force and violence against deceased



while he was then and there engaged at his work as aforesaid; that he was then and there knocked to the ground and so injured that he died, etc.

The second count further alleges that it became necessary for Appellant, Chicago City Railway Company through its agents and servants, to carry materials across said tracks upon which cars were being operated by appellants; that it became the duty of appellants in operating their cars upon said tracks to give to the servants of Appellant, Chicago City Railway Company, engaged in carrying material across and upon said tracks, reasonable time and opportunity to deposit the material so being carried by said servants and to so manage and operate their cars as not to cause injury to said servants of the Chicago City Railway Company; that appellants were default in their said duty in that, while decedent was engaged in carrying material to the portion of said roadbed between the two tracks and while exercising due care and caution for his own safety, they so carelessly, negligently and improperly drove, propelled and operated a certain electric car in a northerly direction along and upon South Chicago Avenue without giving decedent any warning of the approach of said car by ringing a bell or blowing a whistle or any other means, whereby the said car was driven with force and violence upon decedent, etc.

The third count is substantially a composite of the first and second counts.

At the time in question there were upon South Chicago Avenue, which runs in a north westerly and southeasterly direction, two street car tracks, the east track being the north bound track and the west track being the south bound track. The decedent was employed by the Chicago City Railway Company in the work of re-paving the right of way with brick, and was one of a gang of thirteen or fourteen men so employed. They



were working southward from 70th street, taking up the old brick, cleaning such of the old brick as were fit for use in re-paving, and re-paving the south bound track and the center space between the two tracks. Then the old brick were removed from the pavement they were carried by the men to the east curb of the street and such as were fit for use in re-paving were there cleaned and piled up with the new brick necessary to be used. Shortly after 7 o'clock on the morning of ~~October 20,~~ <sup>October 20,</sup> 1909, the decedent picked up several brick from the pile at the east curb, and carrying them on his arm, walked in a north-easterly direction toward the car tracks. Then he reached the center space between the two tracks he stopped and stooped over for the purpose of dropping or placing the brick in said center space, and while in such stooped position was struck on the right side or shoulder by the corner of a north bound car approaching on the east track, and thereby sustained injuries which resulted in his death.

Whether or not the motorman sounded a gong or whistle as the car approached the point where decedent was struck is sharply controverted in the evidence, and the evidence bearing upon the question of the rate of speed at which the car was then being operated is in close conflict. If the only issue to be determined was whether or not the negligence charged in the declaration was proven by the greater weight of the evidence we should not be justified in holding that the verdict of the jury upon that issue was unwarranted.

The allegation in the declaration that the decedent was, at the time of the accident, in the exercise of due care and caution for his own safety, was a necessary and material allegation, which appellee was required to prove. Axwell v. C., C., C. & St. L. Ry. Co., 261 Ill., 506.

The place of the accident was not at a street crossing, but at a point north of 71st street and south of 70th street.





It is manifest from the evidence that, except for the car in question, the tracks there were clear of cars; that there was no obstruction to obscure a view by decedent of the approaching car, and that no conditions existed which excused his failure to observe the car as it approached. The work in which he was then engaged was of the simplest character, such as did not demand his particular attention, and in the full performance of which he had abundant opportunity to avoid being struck by an approaching car. He had actual knowledge that the tracks were in use for the operation thereon of cars, and there is no evidence of any rule or custom upon the observance of which he might have relied, requiring the motormen or other employees to notify laborers upon or near the tracks of the approach of cars. There is not a scintilla of evidence tending to show any act on the part of decedent, which indicated either that he did or did not actually see the car as it approached, but so far as the evidence discloses to the contrary, he walked upon and across the west track and upon the center space between the two tracks, wholly oblivious of any possible danger of being struck by an approaching car upon either track.

It is insisted by appellee that the doctrine announced in some of the cases, that "anticipation of negligence in another is not a duty which the law imposes", taken and applied in connection with a presumption arising from the natural instinct prompting the preservation of life and the avoidance of injury, is sufficient in itself to establish the care on the part of decedent in this case.

Where, as in the case at bar, the conduct of a person immediately before and at the time of an occurrence which results in his death is described by eye-witnesses, and there is nothing in the facts and circumstances surrounding the occurrence to indicate that the decedent perceived the danger



to which he was exposed, there is no room for the presumption sought to be availed of, and such presumption does not become operative. Newell v. C. C. C. & St. L. Ry. Co., supra.

Even where there is no eye-witness to the occurrence, such presumption is not available to establish the care on the part of the decedent, in the absence of proof of his character and habits in respect to care. Newell v. C. C. C. & St. L. Ry. Co., supra.

Respecting the other branch of the question involved it has been recently said:

"There is a presumption of law that every person will perform the duty enjoined by law or imposed by contract, and anticipation of negligence in others is not a duty which the law imposes. (Chicago, Burlington & Quincy Railroad Co. v. Gunterson, 174 Ill. 495; Chicago City Railway Co. v. Pennington, 199 id. 2.) While that statement has often been made and the presumption is to have due weight in determining questions of negligence, it is manifest that the presumption is not a conclusive one and that no one has a right to rely solely upon it in regulating his own conduct. The presumption does not absolve one from exercising such care and diligence as a reasonably prudent person would under the same circumstances." "One who has an unobstructed view of an approaching train would not be justified in closing his eyes and crossing a railroad track in reliance upon the presumption that a bell would be rung or a whistle sounded. No one can assume that there will not be violations of the law or negligence of others and offer the presumption as an excuse of failure to exercise care." Schlauder v. Chicago & SO. Trac. Co., 253 Ill., 154.

Counsel for appellee, while conceding the authority of this court to reverse the judgment of a trial court without remanding the cause, upon the ground that the verdict of a jury lacks support in the evidence or is against the manifest weight of the evidence, somewhat overstep the bounds of proper argument by suggesting that if such authority is so exercised in the case at bar, or in like cases, legislative action may be expected to be invoked to withhold such authority from the courts.

No duty imposed by law upon this court is discharged with so grave a sense of responsibility as in its duty, in a proper case, to reverse the judgment of a trial court with a



finding of fact to be incorporated in the judgment of this court. There, however, the duty of this court to enter such judgment is clear, as it is in the case at bar, a failure to perform that duty would be subversive of settled law.

In the absence of evidence tending to show that decedent was in the exercise of due care for his own safety, or proof of any facts or circumstances from which due care on the part of decedent for his own safety might properly be inferred, the judgment must be reversed with a finding of fact to be incorporated in the judgment of this court.

JUDGMENT REVERSED WITH  
FINDING OF FACT.

FINDING OF FACT:

We find that the injuries which resulted in the death of appellee's intestate were occasioned by his failure to exercise due care for his own safety.



21 - 18903.

DOROTHY BROCKHAUS, an infant, by  
MARGARET A. BROCKHAUS, her next  
friend,

Defendant in Error,

vs.

AGNES B. GARNER,

Plaintiff in Error.

WRIT OF ERROR TO  
MUNICIPAL COURT  
OF CHICAGO.

18914 560

MR. PRESIDING JUSTICE BAUME  
DELIVERED THE OPINION OF THE COURT.

On August 17, 1912, Dorothy Brockhaus, an infant, by Margaret A. Brockhaus, her next friend, instituted an action of the fourth class in the Municipal Court to recover damages for personal injuries alleged to have been occasioned by the negligence of the defendant. A statement of claim and demand for a jury trial were filed on behalf of the plaintiff, and on August 23, 1912, the defendant entered her general appearance and moved the court to require the plaintiff to file a more specific statement of claim. This motion was allowed and plaintiff was ruled to file a more specific statement of claim within five days, and defendant was allowed ten days within which to file her affidavit of merits. On August 26, 1912, a more specific and sufficient statement of claim was filed on behalf of the plaintiff, but defendant failed to file her affidavit of merits, and on September 4, 1912, judgment was entered against her by default for her failure to file and for want of such affidavit of merits. On September 10, 1912, the defendant having failed to take any further steps in the case, a jury was impanelled to assess the damages of the plaintiff and proceedings appear to have been then had re-





sulting in a verdict and judgment against the defendant for \$300 damages. Thereafter the defendant moved the court to vacate and set aside such judgment, which motion was overruled, and defendant then prosecuted this writ of error.

A motion interposed by plaintiff to strike the purported bill of exceptions from the record was reserved to the hearing. The portion of the record which purports to be a bill of exceptions is not a model, but it sufficiently presents for review at least three of the twenty-nine questions raised by the defendant, and said motion to strike will be denied.

The rules of the Municipal Court herein involved are properly preserved in the record.

Rule 16 provides, that in fourth class cases for the recovery of money only, the plaintiff shall file with his statement of claim an affidavit sworn to by the plaintiff, or his agent or attorney, showing the nature of his demand, and the amount due from the defendant, provided that in cases for unliquidated damages the plaintiff need not state in his affidavit the amount of damages claimed.

that  
Rule 17 provides/in such cases the defendant shall file an affidavit sworn to by himself, his agent or his attorney, stating that he verily believes that the defendant has a good defense to said suit upon the merits to the whole or a portion of the plaintiff's demand, and specifying the nature of such defense, which affidavit shall be filed with the defendant's appearance, provided that upon good cause shown the time for filing such affidavit may be extended for such reasonable time as the court shall order, and further that, if the defendant fails to file an affidavit of merits, such as is required by the rules of the court, the plaintiff shall be entitled to judgment by default upon the plaintiff's affidavit of claim, or upon such further evidence as the court may require.



The affidavit accompanying plaintiff's statement of claim in this case is, in form, as follows:

"James M. Patano, being first duly sworn, on oath states that he is the agent of the plaintiff in the above entitled cause; that the nature of plaintiff's demand is as follows: for personal injuries as set forth in the above statement of claim."

It is urged that as an infant is without capacity to appoint an agent the affidavit of plaintiff's claim purporting to be made by an agent conferred upon the court no jurisdiction of the subject matter of the cause of action, or of the person of the plaintiff, and that no summons could properly issue against the defendant.

Defendant entered her general appearance in the case and thereby submitted her person to the jurisdiction of the court, even in the absence of any summons. The informality, if any, in the affidavit to plaintiff's statement of claim did not operate to deprive the court of jurisdiction of the subject matter of the cause of action. The affidavit might properly have been amended and doubtless would have been so amended, or a more formal affidavit filed, if defendant had raised the question in the court below. Inadequacy of the affidavit of plaintiff's claim cannot be first raised after verdict and judgment, to defeat a recovery upon a cause of action of which the court has jurisdiction of the subject matter. After the entry of appearance by defendant the judgment by default upon her failure to file an affidavit of merits within the time limited was irregular. Judgment should have been nil dicet or for want of plea. The irregularity, however, in this respect does not require a reversal of the judgment upon the merits. Mann v. Brown, 263 Ill., 464.

There is no error in the record of which defendant can complain to defeat the judgment, and the judgment is affirmed.

JUDGMENT AFFIRMED.



March Term, 1900.

54 - 19040.

HARRY M. ENGLESTEIN and  
LOUIS ENGLESTEIN, Co-partners,  
doing business as HARRY M.  
ENGLESTEIN & CO.,

Plaintiffs in Error,

vs.

WILLIAM BARTHOLOMAE and FREDERICK  
BARTHOLOMAE,

Defendants in Error.

188 I.A. 562

ERROR TO

MUNICIPAL COURT

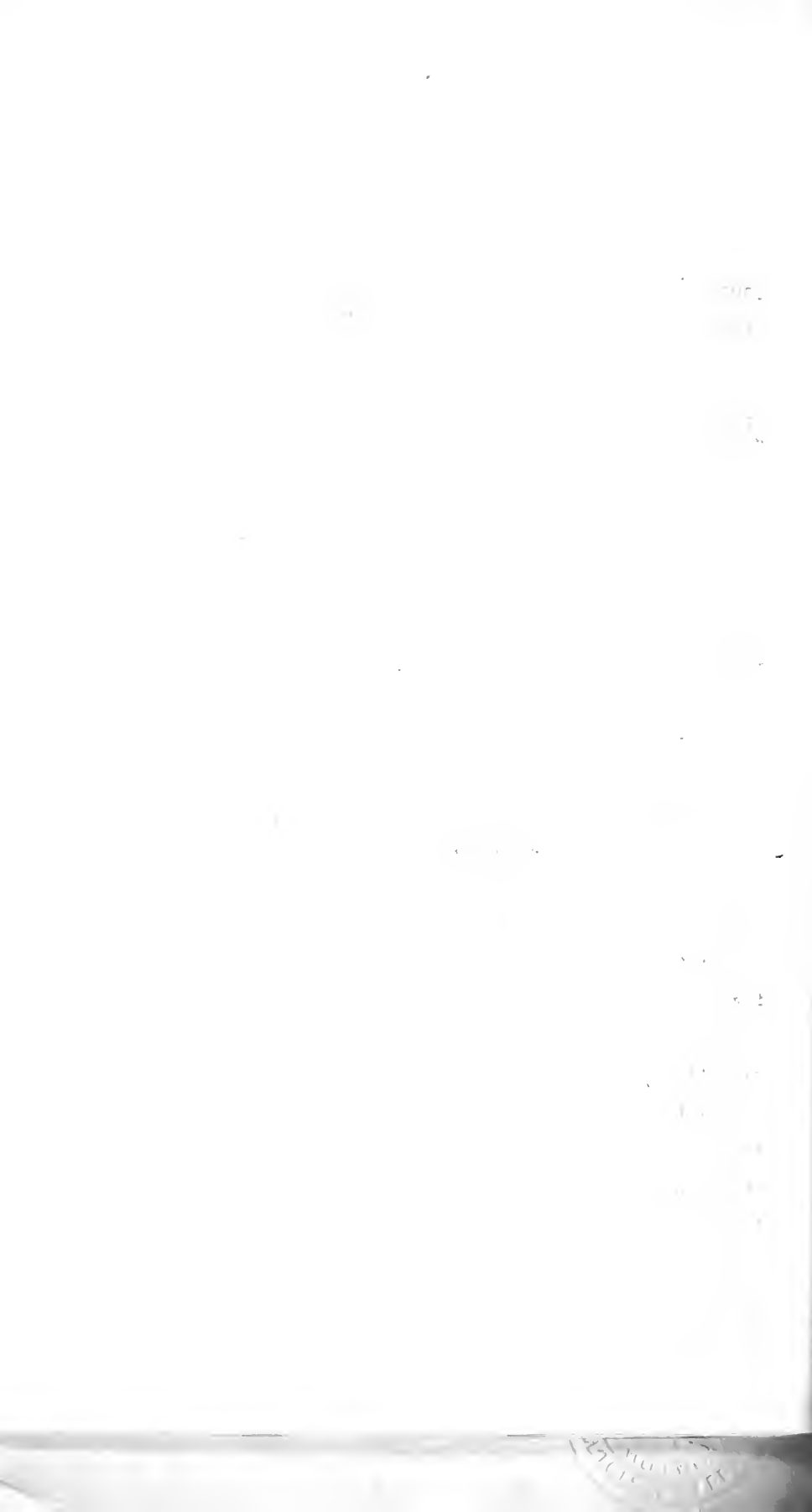
OF CHICAGO.

MR. PRESIDING JUSTICE BAUME  
DELIVERED THE OPINION OF THE COURT.

This is a suit instituted in the Municipal Court by plaintiffs in error against defendants in error to recover real estate brokers' commissions. A trial by the court resulted in a finding in favor of defendants in error and judgment against plaintiffs in error for costs.

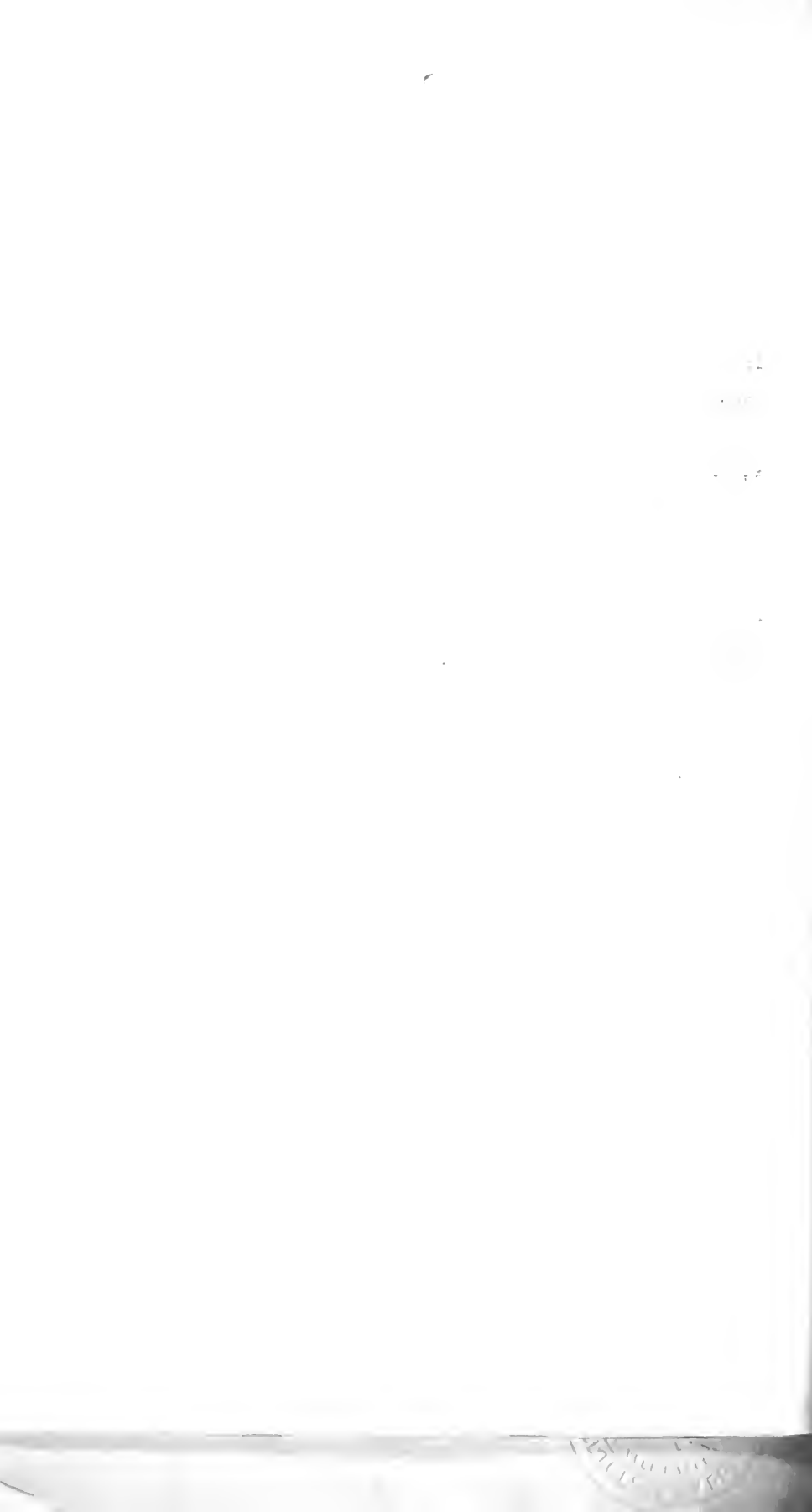
It is insisted that the finding of the court is against the manifest weight of the evidence.

~~It is uncontroverted that~~ in May, 1912, defendants in error agreed in writing through plaintiffs in error as their brokers to sell for \$12,000 their property, then being operated as a "nickel theatre", to one Stone, who contemplated associating with him in the purchase of the property, Charles Benesch and George Paul; that defendants in error then agreed to pay plaintiffs in error a commission of 2½%; that the contract was not signed by Stone, because he was unable to complete satisfactory negotiations with Benesch, and was unable personally to raise the required cash payment of \$5,000; that shortly thereafter plaintiffs in error informed defendants in error that they believed they could sell the property for \$12,500, and in that event they should have an additional commission of \$300; that plaintiffs in error were informed by Stone that



Benesch was a prospective purchaser, and thereupon they interviewed Benesch and arranged a meeting between defendants in error and Benesch to negotiate for the property; that plaintiffs in error accompanied Benesch to the place of business of defendants in error and then introduced Benesch to defendants in error as a prospective purchaser; that that was the first occasion upon which Benesch had ever personally met or "talked business" with defendants in error; that on several occasions thereafter plaintiffs in error interviewed defendants in error and were informed by the latter that they were not ready to close a deal; that on July 18th following defendants in error without the knowledge of plaintiffs in error sold the property to Benesch for \$12,500, and refused to pay plaintiffs in error any commissions on said sale.

There is some pretense on the part of defendants in error that one, Moss, was the procuring cause of the sale to Benesch. Benesch was a retail grocer and Moss was a salesman of groceries, with whom Benesch had transacted considerable business and in whom Benesch had confidence. The evidence tends to show that on one evening prior to the purchase of the property by Benesch he stood with Moss for about 15 minutes on the sidewalk on the opposite side of the street from the property for the purpose of observing the amount of patronage the "nickel theatre" business conducted by defendants in error was enjoying. This was the extent of Moss' relation to the transaction. Paraphrasing what is said in Ridgdon v. More, 226 Ill., 382: "Where a broker has been employed by the seller to find a purchaser for the property and through his efforts the seller has been brought into communication with the purchaser, the broker cannot be deprived of his commissions, because the seller takes up and completes the negotiations himself, or through another party. The court there also quotes with approval what was said in Hafner v. Harrison, 165 Ill., 242,





as follows:

"Nor is it always necessary that the purchaser should be actually introduced to the owner by the broker, provided it appears affirmatively that the purchaser was induced to apply to the owner through the instrumentality of the broker or through means employed by the broker. It is sufficient if the sale is effected through the efforts of the broker or through information derived from him. (Sussdorf v. Schmidt, 55 N. Y. 319; Stewart v. Mather, 32 Wis. 344; Lincoln v. McClatchie, 36 Conn. 136.) It is also true that where the seller consummates a sale of property upon different terms than those proposed to his agent, the latter will not be thereby deprived of his right to his commission. Stewart v. Mather, supra." See also Rounda v. Victoria Hotel Co., 184 Ill. App., 500.

The evidence adduced in this case clearly demanded a finding in favor of plaintiffs in error for at least  $2\frac{1}{2}$  per cent upon the amount of the sale, and a contrary finding can not be sustained.

The evidence bearing upon the question whether or not defendants in error agreed to pay to plaintiffs in error an added commission of \$300 if the property was sold for \$12,500, is closely conflicting, and we express no opinion as to the probative force of the evidence upon that question.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.



March 1 - 19089.

94 - 19089.

JAMES B. MADSEN,  
Plaintiff in Error,

vs.

N. B. CORDELL,  
Defendant in Error.

188 I.A. 564

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

188 I.A. 564

MR. PRESIDING JUSTICE BAUM  
DELIVERED THE OPINION OF THE COURT.

This is a suit instituted in the Municipal Court by J. B. Madsen, doing business as J. B. Madsen & Company, against N. B. Cordell to recover a balance of \$199.48, alleged to be due for certain trade fixtures and certain extras sold and delivered to the defendant for the equipment of a butcher shop. Defendant filed his affidavit of merits wherein he claimed a set-off by reason of the failure of the plaintiff to furnish a sufficient ice box and the refusal of the defendant to accept the ice box furnished by the plaintiff. A trial by the court resulted in a finding in favor of the defendant upon his claim of set-off and judgment against plaintiff for \$83, to reverse which judgment the plaintiff prosecutes this writ of error.

On June 24, 1912, defendant in error gave to plaintiff in error an order partly printed and partly in writing as follows:

"Terms

Cash on delivery.

J. B. Madsen & Co.

Date Sold 6/24/12.

No. 839.

Sold to N. B. Cordell

Town and State. 152-4 S. 44th Ave.

Delivery July 3rd, 1912.

Saleman Banks.

1 10'-0" Counter 24" Marble top Marble base Tile front  
and ends

1 8-0 Counter the same as above.

2 30x30 Meat Blocks.

1 18-0 Meat Rack.

2 Window Rails Bent 6'-2" Each.



1 14'-0x8'-0x10'-0 Meat Box Tile front Marble Base with 5'-6" Partition including door on North end of Box 3'-6" Partition on South end of Box 5'-0 of South end of box to be finished all cornice to extend to ceiling all expose wood to be oak Mirror in center door. \$40.00

Light finish.

(Signed) H. B. Cordell."

*included*  
The ice box designated in the order as the "Meat Box" was not installed ready for the reception of ice until July 12th or 13th, 1912, and some extras necessary for the proper equipment of the ice box were not supplied and installed until August 19, 1912. On July 19, 1912, defendant in error paid plaintiff in error on account \$400. It is conceded that the charge for the ice box, which was included in the total amount of \$540 stated in the original order, was \$282. The ice box was manufactured by plaintiff in error in his factory in sections and was so delivered on the premises of defendant in error, where the several sections were united and the doors and partitions installed by the employees of plaintiff in error.

It is uncontroverted that after defendant in error commenced to use the ice box for the storage of meat the lowest temperature obtainable was from 44 to 54 degrees, and that the temperature required for the proper preservation of meat is from 38 to 40 degrees. It is further uncontroverted that on August 20, 1912, defendant in error observed a crack or opening 1-1/16 inches in width in the rear of the ice box, occasioned either by the separation of the sections forming its construction, or the coming apart of the matched flooring of which the several sections were constructed. The evidence tends to show that the ice box was wholly inefficient to serve the purpose for which it was designed, and that defendant in error repeatedly complained to plaintiff in error of the failure of the ice box to maintain the proper temperature and of the defective workmanship and material resulting in the



openings or cracks in the rear of the ice box and of its defective condition in other particulars, and that plaintiff in error disregarded such complaints and made no attempt to remedy the defects complained of. On September 20, 1912, defendant in error removed the ice box from his butcher shop to the rear of his premises and refused to accept the same upon his order therefor.

The rule is that, "Where a manufacturer contracts to supply an article which he manufactures for a particular purpose designed by the buyer and known to the vendor, so that the buyer necessarily trusts to the judgment or skill of the manufacturer, there is an implied warranty that the article shall be reasonably fit for the purpose to which it is to be applied." Luche & Lang Co. v. Kirtledge & Co., 240 Ill., 68; Edwards v. Dillon, 147 Ill., 14; Seitz v. Brewers Ref. Koch, Co., 141 U. S., 510. See also Oil Well Supply Co. v. Watson, 168 Ind., 603, and note on same case in 15 L. R. A. (N. S.), 868.

It is insisted on behalf of plaintiff in error that there was an acceptance by defendant in error of the ice box in question, 1st, by his several receipts for the various portions of the ice box, as being in good order when they were delivered at his shop, and by the several "C.K.'s" by defendant in error upon time cards which plaintiff in error required his mechanics to furnish in order that they might receive credit for the time employed by them in the performance of their work; and, 2nd, by his having used the ice box from the time it was installed in his shop in July or August, 1912, until September 20, 1912.

On July 9, 1912, there was delivered at the shop of defendant in error by a treasurer of plaintiff in error fragments of the ice box consisting of one partition and door and one partition with tile, and on July 16, 1912, there was





delivered in like manner the several sections of the ice box, and in each instance defendant in error signed a receipt therefor following an enumeration of the articles delivered, as follows: "Received the above goods in good order."

Manifestly, the main purpose in procuring these receipts was to inform plaintiff in error that his teamsters had delivered the goods at their proper destination. No opportunity was given defendant in error to examine the several articles delivered and no examination then made by him of the several fragments of the ice box would have disclosed the efficiency of such fragments, when assembled, to properly perform the functions of an ice box such as was required for the purposes of his business. The "C.K." by defendant in error of the time cards of the employees of plaintiff in error is not of sufficient significance to merit discussion. It would be an unwarranted extension and application of the doctrine of estoppel to hold that defendant in error by signing the receipts and time cards mentioned was precluded from denying that he accepted the ice box as in conformity with the implied warranty by plaintiff in error.

Any use, however slight, of the ice box by defendant in error did not operate to prevent him from exercising his right to reject it on account of a breach of the implied warranty. Whether or not the ice box would maintain the necessary degree of temperature was not determinable until it was used and tested, and when the first complaint was made by defendant in error respecting the failure of the ice box to maintain the necessary degree of temperature, he was assured by plaintiff in error that a further continued use of the ice box would remove the cause of complaint. Defendant in error had a reasonable time within which to reject the ice box after it had failed to comply with the implied warranty, and in de-



termining what was such reasonable time all the circumstances, the conduct of plaintiff in error, and what he said and did, were proper to be taken into consideration by the court.

Dorrance v. Dearborn Power Co., 233 Ill., 354; Underwood v. Wolf, 131 Ill., 425. The question involved was one of fact for the court and upon this record was not improperly determined in favor of defendant in error.

In the case of Wolf Company v. Monarch Refrigerating Co., 252 Ill., 421, relied upon by plaintiff in error, the contract provided that the machine should be accepted or rejected at the end of the test period of ten days, and the machine was thereafter used by the defendant and such use was held to constitute an acceptance under the contract. The case is not in point.

As the finding and judgment of the trial court accomplish substantial justice between the parties, under settled rules of law, there is no occasion to consider other questions raised and discussed by counsel.

The judgment is affirmed.

JUDGMENT AFFIRMED.



117 - 19113.

WHITE OAK COAL COMPANY,  
Defendant in Error,

vs.

JOHN WORTHINGTON,  
Plaintiff in Error.

188  
7  
ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE  
DELIVERED THE OPINION OF THE COURT.

188 I.A. 567

The White Oak Coal Company brought suit in the Municipal Court against John Worthington to recover \$679.11 for coal delivered at and consumed in heating an apartment building owned by the defendant. One Ebbert, a coal salesman employed by the plaintiff, was a tenant of the defendant for the term of one year beginning May 1, 1910, at a rent of \$60 a month, payable in advance. Ebbert paid the rent for May, June and July, 1910, in cash, and thereafter until December 12, 1910, at his solicitation, the defendant accepted coal for the rent accruing to February 1, 1911. This coal was procured by Ebbert from Theo. F. Gilmore & Co. and delivered at the building. In the latter part of January, 1911, defendant directed Ebbert to fill up the basement of the building with coal, and Ebbert communicated this order to the book keeper or local manager of the plaintiff and plaintiff delivered the coal in question during February and March, 1911. During this time Robert F. Schenck or Robert F. Schenck & Co. were the rental agents of defendant for the apartment building, and the charges for the coal so delivered were entered upon the books of the plaintiff against R. F. Schenck & Co., and the two invoices for said coal, bearing date March 1, 1911, and April 1, 1911, respectively, were made out as follows:

"Sold to.....R. F. Schenck, Agt.  
Delivered.....J. Worthington Bldg.  
45th & Drexel Address 100 Washington St."



Statements of the coal delivered were sent by the plaintiff to Schenck and by him were sent to the defendant. Ebbert vacated the apartment at the end of his term on May 1, 1911, without having paid the rent for February, March and April, amounting to \$180.

The position assumed by the defendant is that he incurred no personal liability to plaintiff for the coal; that his direction to Ebbert to procure the coal was made in compliance with an agreement between them that Ebbert should pay his rent in coal to be purchased or procured by him upon his own credit.

Upon a trial of the cause by the court without a jury there was a finding and judgment against defendant for \$499.11, the full amount of plaintiff's claim, less \$180, being the amount of rent due from Ebbert to the defendant. To reverse this judgment the defendant prosecutes this writ of error and the plaintiff assigns errors questioning the propriety of the action of the court in allowing to defendant as a credit upon plaintiff's claim the rent due from Ebbert.

Ebbert testified that upon the occasion in January, 1911, when he was directed by the defendant to procure the coal in question, he told the defendant that he (Ebbert) could only sell defendant coal where the purchase was made direct from the plaintiff. He further testified that during the summer of 1911, and after he had vacated the building on May 1, defendant demanded payment of rent from him and asked to know why he didn't pay his rent; that he told defendant he didn't have the money, and defendant said he would refuse to pay plaintiff's bill until he (Ebbert) paid defendant.

Defendant testified that in January, 1911, Ebbert was in arrears for several months in the payment of his rent and that his direction to Ebbert to procure the coal in ques-





tion was given upon an express agreement with Ebbert that the coal should be procured by him upon his own credit and delivered to and received by defendant in payment of the rent due and to become due from Ebbert. Defendant is manifestly mistaken in so testifying. It is clearly established by the evidence that on December 12, 1910, Ebbert paid his rent in full, including rent for January, 1911, and that upon the occasion in January, 1911, when defendant directed him to fill up the basement with coal Ebbert was not indebted to defendant in any amount for rent. Furthermore, as Ebbert's lease of the apartment expired May 1, 1911, and only rent to the amount of \$180 could accrue for the remainder of his tenancy, it is inconceivable that defendant, acting in good faith, would have directed Ebbert, upon his own credit, to procure a sufficient amount of coal to fill up the basement, at an approximate cost of \$700.

There is no pretense by defendant in this case that the coal delivered to his building was inferior in quality or that the price charged therefor by plaintiff was unreasonable, and it is conceded that the coal was used for heating the building.

The denial by defendant of any liability to plaintiff is mainly predicated upon the claim that with knowledge of the fact that defendant was the principal and Schenck was his agent, plaintiff gave credit for the coal in question exclusively to such agent, and thereafter brought suit in the Municipal Court against such agent to recover the purchase price of said coal, in which suit there was a finding and judgment against the plaintiff.

If competent evidence of any such finding and judgment of the Municipal Court was offered upon the trial, such evidence does not appear in the abstract prepared and filed



by defendant, and in this case we are not disposed to undertake a search of the record for the purpose of discovering evidence which the rules of this court, and the well settled practice in the courts of review in this state, require to be presented for consideration in an abstract of the record.

Inman v. Miller, 234 Ill., 336; Love v. Dick, 177 Ill. App., 98; Salisbury v. Deutsch, 178 Ill. App., 633.

Neither the fact that credit in the first instance was given to Schenck, the agent of defendant, nor the fact that plaintiff first commenced an action against said Schenck can be deemed conclusive of an election by plaintiff to discharge the defendant as the principal. Perry v. Moore, 18 Ill. App., 135; Laguna Valley Co. v. Fitch, 181 Ill. App., 607; Kussenden v. Raiffe, 131 Ill. App., 450; Ketterstrom v. Peerless Portland Cement Co., 133 Ill. App., 579. See also case note to Murphy v. Hutchinson, 21 L. R. A. (N. S.), 786. Upon the record as here presented for review further discussion of the question is unnecessary.

The finding by the trial court that defendant was primarily liable to plaintiff for the coal sold and delivered is sustained by the evidence, but such finding is wholly irreconcilable with the further finding that defendant was entitled to a deduction from the amount of such liability of \$180 due him from Ebbert for rent, in the absence of any proof even tending to show that plaintiff consented to or acquiesced in the allowance of such deduction.

The judgment will be reversed upon the gross errors assigned by the defendant in error and judgment will be here entered in favor of defendant in error and against plaintiff in error for \$679.11 damages and costs of suit. The costs will be taxed against plaintiff in error.

JUDGMENT REVERSED AND  
JUDGMENT HERE.



March Term, 1918, No.

194 - 19198.

SAM FRANKENSTEIN,  
Defendant in Error,  
  
vs  
  
MAX WEBER and DAVID WEBER, Co-partners  
as WEBER BROTHERS,  
Plaintiffs in Error.

188 I.A. 573

ERROR TO  
  
MUNICIPAL COURT  
  
OF CHICAGO.

188 I.A. 573

MR. PRESIDING JUSTICE BAUER  
DELIVERED THE OPINION OF THE COURT.

This suit was instituted in the Municipal Court by defendant in error against plaintiffs in error to recover a balance of \$186.98 alleged to be due for goods, wares and merchandise sold and delivered. Upon a trial by the court there was a finding and judgment against plaintiffs in error for the amount claimed to be due as stated.

The record contains neither a correct stenographic report of the proceedings nor a correct statement of facts by the trial judge. What purports to be a correct statement of facts is merely a statement that certain witnesses testified to certain facts, in substance, as there stated in narrative form. The judgment might well be affirmed for failure to file a proper record. Kellogg v. City of Chicago, 176 Ill. App., 136; Schiavone v. Bardo, 179 Ill. App., 51.

The evidence, however, in the record as presented tends to show an original promise by plaintiffs in error to pay for the articles furnished, and as a finding in favor of defendant in error upon that issue may properly be sustained, the judgment will be affirmed.

JUDGMENT AFFIRMED.



March Term 1913, 13,  
220 - 19225.

HENRIETTA G. DANIELS;  
Defendant in Error, )

vs. )

CHICAGO, BURLINGTON & QUINCY  
RAILWAY COMPANY, and CHICAGO,  
BURLINGTON & QUINCY RAILROAD  
COMPANY, )

Plaintiffs in Error. )

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

188 I.A. 574

MR. PRESIDING JUSTICE BAUNE  
DELIVERED THE OPINION OF THE COURT.

In a suit brought by defendant in error against plaintiffs in error in the Municipal Court to recover damages for personal injuries claimed to have been occasioned by the negligence of plaintiffs in error, a trial by the court resulted in a finding and judgment against plaintiffs in error for \$350.

The amended statement of claim filed by defendant in error December 12, 1912, alleges that the injuries complained of were sustained on January 23, 1911. In their affidavit of merits filed by plaintiffs in error they deny that defendant in error sustained the injuries complained of on or about January 23, 1911, and aver that on or about December 31, 1909, defendant in error was a passenger on one of the trains of one of the plaintiffs in error and in alighting therefrom she slipped and fell, and further aver that any cause of action that may have accrued to her by reason thereof is barred by the statute of limitations.

The only question presented for review is that arising upon the claim of plaintiffs in error that the cause of action is barred by the statute of limitations, and it is insisted that upon this issue the finding of the trial court is clearly against the weight of the evidence.

In this State it is held that the Statute of Limita-





tions is an affirmative defense, and that the burden of proving it is on the party pleading it. Schell v. Weaver, 325 Ill., 150.

It would serve no useful purpose to review and discuss in detail the evidence bearing upon this issue. We have carefully examined and weighed the case as it appears in the record, and find it inextricably conflicting. We cannot say that the conclusion arrived at by the trial court is palpably wrong.

The judgment is affirmed.

JUDGMENT AFFIRMED.



March Term, 1913, No  
285 - 19291.

FRANZ KOCH, FRANK J. KOCH, JOHN A.  
RICHERT and ARNOLD BRAUTIGAM, doing  
business as KOCH & COMPANY,

Appellants,

vs.

JOHN H. SUDERTSKI,

Appellee.

1881 A 27 E  
APPEAL FROM

COUNTY COURT,  
COCK COUNTY.

1881 A 27 E  
MR. PRESIDING JUSTICE BAUMF  
DELIVERED THE OPINION OF THE COURT.

This is a suit in assumpsit by appellants against appellee instituted in the County Court, wherein appellants filed their declaration consisting of the common counts, and attached thereto their affidavit of claim. Appellants also filed a bill of particulars. Appellee filed an affidavit of merits and a verified claim of set-off, to which claim of set-off appellants pleaded the general issue, accord and satisfaction and the five year statute of limitations. In this state of the record a jury was empanelled, whereupon before the introduction of any evidence, and again at the close of the evidence for appellants and at the close of all the evidence the attention of the court was directed by appellants to the fact that appellee had neither pleaded the general issue nor replied to appellants' plea of accord and satisfaction and the statute of limitations to appellee's plea of set-off. The trial court overruled appellants' motion for a peremptory instruction upon the pleadings filed and without requiring appellee to join issue thereon submitted the case to the jury for their verdict. The jury returned a verdict for appellee upon his plea of set-off and assessed his damages against appellants at \$245, and judgment was entered on such verdict.

Appellee admits the informality and irregularity of the proceedings, but insists that appellants waived the neces-



sity of formal pleas by going to trial upon the merits and in support of such insistence cites numerous authorities announcing the well settled rule that a party having proceeded to trial without objection, as upon issues joined, cannot after verdict or for the first time in a court of review be permitted to take advantage of the failure of the opposite party to file proper pleas. These authorities have no application to the instant case, wherein the record discloses that appellants made timely and repeated objections in the trial court to the procedure adopted.

The judgment is reversed and the cause remanded for further proceedings upon issues to be properly joined.

REVERSED AND REMANDED.



March Term, 1933.

313 - 19324.

S. D. RYAN;

Appellee,

vs.

THOMAS E. McARDLE,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

188 I.A. 584

MR. PRESIDING JUSTICE BAUER  
DELIVERED THE OPINION OF THE COURT.

In a suit instituted in the Municipal Court by S. D. Ryan against Thomas E. McArdle to recover installments of rent from October 1, 1905, to September 1, 1910, alleged to be due by the terms of a certain lease, a trial by the court resulted in a finding and judgment against the defendant for \$1,845, to reverse which judgment he prosecutes this appeal.

A former suit by appellee against appellant to recover \$795.65 salary and installments of rent alleged to be due under the terms of the same lease from September 1, 1905, to October 1, 1906, brought in the County Court, resulted in a verdict and judgment against appellant for \$472.50, from which judgment he prosecuted an appeal to this court, where said judgment was affirmed. Ryan v. McArdle, 159 Ill. App., 579.

The lease in question is set out in the opinion of the court on the former appeal, reference to which is here made. The proceedings in the former suit are incorporated in the statement of claim filed by appellee in the instant suit and the complete record in the former suit, including the opinion of this court on the former appeal and the mandate of this court affirming the judgment in said former suit, were introduced in evidence in this suit by appellee.

The bill of particulars filed by appellee in the former suit is as follows:





"Salary and rent from September 1, 1906, to  
January 6, 1906.....\$630.00  
Rent from January 6, 1906, to October 1, 1906... 660.00  
\$1,290.00

Credit.

By cash on account.....\$494.48  
Balance due on October 1, 1906.....\$795.52

The principal claim of appellee in the present suit is stated in his statement of claim filed herein as follows:

"Par. 15. That after the beginning of this (the) suit in the preceding paragraphs mentioned (being the former suit in the County Court) there has accrued due to the plaintiff from the defendant as rent under the agreement herein and in said suit pleaded rent at the rate of \$75 per month from the first of October, 1906, to the 30th of August, 1910, 47 months, making an aggregate of \$3,525.00.

"Par. 16. That the plaintiff has received as a credit on said \$3,525.00, by re-renting the premises in said agreement leased for the account of said defendant sums aggregating \$1,680.00, and no more, as follows, viz.:

"From 1st of October, 1906, to 30th of September, 1907, at \$50 per month.....\$1,500.00  
"From August 26, 1909, to February 26, 1910,  
at \$30 per month..... 180.00  
"From February 26, 1910, to August 26, 1910,  
at \$50 per month..... 300.00  
\$1,680.00

Leaving a balance of \$1,845.00 due the plaintiff."

In the affidavit of merits filed by appellant he avers, as grounds of defense to the whole of appellee's demand, that on or prior to October 1, 1906, appellee, without notice to appellant, entered upon the premises mentioned and again re-posseessed himself of the same; that said entering upon said premises by appellee on or prior to October 1, 1906, was not done with the knowledge or consent of appellant and was not done under the terms of the agreement in writing, set forth in appellee's statement of claim; that the said action of appellee in entering into and upon said premises and re-posseessing himself of the same amounted to a termination of tenancy which might theretofore have existed by virtue of said agreement in writing; that without the knowledge or consent of appellant



or without any notice to him, appellee has from and since October 1, 1906, been and remained in possession of said premises, either personally or by his agent or tenant, and that such act and acts upon the part of appellee so done without the consent or knowledge of appellant amounted to and was an eviction of appellant from said premises, and that thereby any and all right to demand rent of appellant which may have existed prior to such eviction, ceased and terminated.

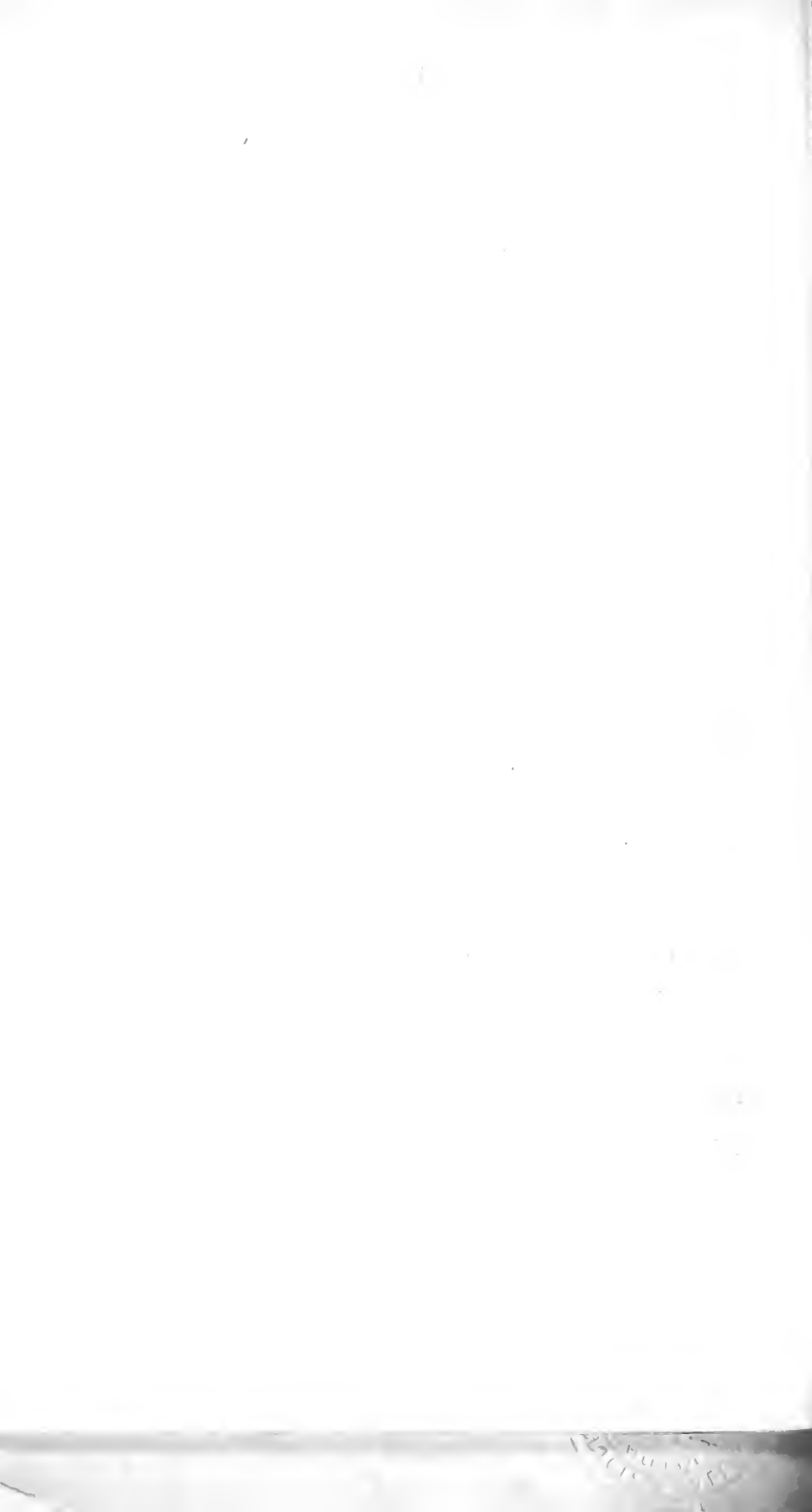
As a separate and further defense appellant avers that on October 6, 1906, he was by appellee impleaded in a certain suit in the County Court of Cook County, being the proceeding particularly mentioned in appellee's statement of claim; that in such suit or proceeding appellee sought to recover from appellant for rent for the said premises for the period from January 6, 1906, to October 1, 1906; that in said suit so commenced in said County Court, appellant appeared and defended said cause, and that one of the defenses made by appellant to said suit was that appellee had, on January 6, 1906, evicted appellant from said premises by entering into possession thereof and exercising acts of ownership and of possession over the same, and that said defense was successfully made by appellant in said suit in said County Court and appellee did not recover from appellant for rent for said period from January 6, 1906, to October 1, 1906, and that thereby it became res judicata as between appellee and appellant that appellant had been evicted from said premises by appellee.



Relative to the first ground of defense set forth in appellant's affidavit of merits, it is insisted that as the lease in question was made in Iowa and in reference to premises there situate, it must be construed in accordance with the law of Iowa; that it is settled law in Iowa that if a tenant abandons premises and the landlord enters into possession and rents the same, without notice to the tenant that he is renting for the account of the tenant, a surrender of the premises is established and the lease terminated.

This insistence might well be dismissed without further consideration because the law as it is claimed to exist in Iowa was neither alleged as a ground of defense nor proved upon the trial. Indeed, there is no suggestion in the record that this precise question was raised in the court below. The laws of other states are required to be pleaded and proved in the courts of this state as facts. Edwards v. Schillinger, 245 Ill., 731; Leathe v. Thomas, 218 Ill., 246; Colozza v. Iowa Central Ry. Co., 182 Ill. App., 32.

It is clearly established by the evidence that upon the refusal of appellant to take possession of and use the premises under the lease, appellee notified appellant that he would not cancel the lease, but would hold appellant liable



for rent thereunder. In this state of the record, a re-renting of the premises by appellee, thereby minimizing the damages for which appellant would be liable, would not under the rule announced in the Iowa cases cited by appellant, operate as a surrender and termination of the lease. Brown v. Cairns, 107 Iowa, 727; Armour Packing Co. v. Des Moines Pork Co., 116 Iowa, 723.

The separate and further grounds of defense relied upon by appellant are embodied in the second, third, fifth and sixth propositions submitted by him to the trial court to be held as the law of the case, and the action of the court in refusing said propositions is assigned for error.

The said propositions are as follows:

"2. The court holds, as a proposition of law, that under the evidence herein, the lease between the plaintiff and the defendant, set forth in plaintiff's statement of claim, was terminated by the plaintiff by his act of re-renting the premises described in said lease on the 31st day of January, 1906."

"3. The court holds, as a proposition of law, that under the evidence herein, the lease between the plaintiff and the defendant, set forth in plaintiff's statement of claim, was terminated by the plaintiff by his act of re-renting the premises described in said lease on the 26th day of August, 1909."

"5. The court holds, as a proposition of law, that having impleaded the defendant in a certain cause in the County Court of Cook County, Illinois, on the 18th day of October, 1905, the same being the cause of action particularly mentioned in plaintiff's statement of claim, and the plaintiff having failed to recover from the defendant in said cause in said County Court for rental of said premises for the period from January 6, 1906, to the 30th day of September, 1907, the judgment entered in said cause in the County Court became in effect res adjudicata, as between the plaintiff and the defendant, that the lease mentioned in plaintiff's statement of claim in this cause was terminated by the action of the plaintiff on the 6th day of January, 1906."

"6. The court holds, as a proposition of law, that the judgment of the County Court of Cook County, Illinois, in the cause particularly mentioned in plaintiff's statement of claim in this cause was not res adjudicata as between the parties to this cause, to the effect that the lease set forth in plaintiff's statement of claim herein was and is in full force and effect."





An examination of the record and proceedings in the former suit including the opinion of this court upon the former appeal disclose that the recovery there had by appellee against appellant was for rent only, for the period from Sept. 1, 1905, to Oct. 1, 1906. The amount of the verdict and judgment in the former suit so closely approximates the rent which accrued during that period, less the amount received by appellee as rent up to Oct. 1, 1906, from other parties to whom he re-rented the premises after appellant had refused to take possession of the same under the lease, as to make it apparent that such verdict and judgment were intended to cover the unpaid rent for the entire period involved.

The judgment in the former suit is, therefore, res judicata that said lease was not terminated on January 6, 1906, by the act of appellee in re-renting said premises. Harrell v. Groese Clothing Co., 184 Ill., 421; Kennett Co. v. Aversz, 180 Ill. App., 470. The second proposition was properly refused.

There is neither pleading nor evidence upon which to predicate the third proposition, and it was, therefore, properly refused.

A discussion of the fifth and sixth propositions submitted by appellant and refused by the court would necessitate merely a repetition, in substance, of what has been heretofore said relative to the second proposition refused by the court. Both propositions were properly refused.

The judgment in the former suit is res judicata as to the essential questions raised on this appeal.

The judgment is affirmed. The cost of the additional abstract prepared and filed by appellee will be taxed to appellant.

JUDGMENT AFFIRMED.



March Term, 1912.

341 - 12355.

ESTHER BERENZWEIG,  
Appellee, )  
vs. )  
ABE KRECUN,  
Appellant. )

188 I.A. 586

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE BAUME  
DELIVERED THE OPINION OF THE COURT.

This is a suit instituted March 12, 1912, in the Municipal Court by appellee against appellant to recover damages for alleged breach of promise of marriage, wherein a trial by jury resulted in a verdict and judgment against appellant for \$300.

It is urged that the verdict is unsupported by the evidence; that the suit was prematurely brought; that under the pleading it was necessary for appellee to prove that she requested performance of the alleged marriage contract and that appellant refused to perform, and no such proof was made.

Appellee's statement of claim is as follows:

"For that whereas on or about the 15th day of January, 1912, in the City of Chicago, County of Cook and State of Illinois in consideration that the plaintiff, being then unmarried, had then and there promised the defendant, at his request, to marry him, when she, the plaintiff, should be thereto requested, the defendant promised the plaintiff to marry her, and the plaintiff avers that she, confiding in the said promise of the defendant had always from thence hitherto remained and still is unmarried and has been for all the time aforesaid and still is ready and willing to marry him. That although plaintiff, after making of said promise of the defendant on the day aforesaid, has requested the defendant to marry her, the defendant did not nor would he then marry the plaintiff, but refused so to do, whereby the plaintiff has sustained damages to the extent of the sum of \$3,000."

The affidavit of verita filed by appellant states his defense to the suit as follows: "That defendant never at any time promised to marry the plaintiff."



It is a fundamental rule in pleading that a material fact asserted on one side, and not denied on the other, is admitted. Simmons v. Jenkins, 76 Ill., 479; Hopkins v. Medley, 87 Ill., 408; Fowler Paper Co. v. Bert Jones Sales Book Co., 183 Ill. App., 310.

Under the pleadings the only material fact in issue was whether or not appellant had promised to marry appellee. Upon proof by appellee of such promise, her request to appellant to marry her and his refusal so to do, must be held to have been admitted by appellant.

The evidence introduced on behalf of appellee tends to show that in December, 1911, appellant promised to marry her in May, 1912, and that she expressed her willingness to then marry him. Appellant offered evidence tending to show that he did not so promise to marry appellee. Upon this issue the case was properly submitted to the jury, and we can not say their verdict was unwarranted. The facts and circumstances in evidence, other than the direct testimony of the parties, tend to corroborate the testimony of appellee, rather than the testimony of appellant.

That the suit was prematurely brought appears to have been raised by appellant for the first time in this court. The question is not properly preserved for review. Stitzel v. Miller, 250 Ill., 72.

Upon the record as made the judgment is affirmed.

JUDGMENT AFFIRMED.



JOHN F. DEVINE, Administrator of the  
Estate of WILLIAM LESAK, Deceased,  
Appellee,  
vs.  
WARD BAKING COMPANY, successor to  
WARD-CORBY COMPANY,  
Appellant.)

18814-33  
APPEAL FROM  
CIRCUIT COURT,  
COCK COUNTY.

MR. PRESIDING JUSTICE BAUME  
DELIVERED THE OPINION OF THE COURT.

On March 1, 1911, William Lesak, aged 8 years and 3 months, was struck by an electric truck belonging to appellant and then being operated on Parnell Avenue by a servant of appellant. The lad was thereby injured and taken to his home where he died about an hour thereafter. A suit brought by his administrator to recover damages for his wrongful death resulted in a verdict and judgment in the Circuit Court against appellant for \$4,500.

The declaration contains two counts. The first count alleges that appellant owned, operated and controlled a certain motor car, and by its servant and agent, was operating the same over, upon and along Parnell Avenue; that it became and was the duty of <sup>defendant</sup> appellant in operating said car along said street, to use all proper care and caution in the running of said car, so as not to injure persons on said street; that <sup>defendant</sup> appellant did not regard its duty in that behalf, but on, etc., while <sup>plaintiff's</sup> appellee's intestate was lawfully on said street, and was in the exercise of proper care for his own safety, appellant, regardless of its duty in that behalf, and carelessly, negligently and wrongfully ran, operated and managed said car in so careless and negligent manner and at a high and dangerous rate of speed, so that by reason thereof appellee's intestate was run into, against, knocked down and run over by said car





<sup>servant</sup>  
in charge of appellant's servant and thereby so badly injured, that he died immediately thereto, as a direct result of said injuries.

The second count is similar to the first count, and also further predicates a right of recovery on the alleged negligent failure of <sup>servant</sup> appellant's servant to give proper warning to persons on the street.

At about 3 o'clock on the afternoon of the day mentioned from ten to twenty boys were playing marbles and tag or "it" on the sidewalks and in the roadway on Parnell avenue between 33rd and 35rd streets. The motor truck in question was used for the purpose of delivering bread to the customers of appellant, and was then being driven by Robert J. Foelsch, whose regular route embraced the territory bounded on the south by 39th street, on the north by 31st street, on the west by Shields avenue and on the east by State street. Parnell avenue is two or three blocks west of Shields avenue. The delivery truck was equipped with a wooden enclosure having a glass front and glass sides. Foelsch, after delivering some bread at 31st and Armour avenue, drove west on 31st street to Parnell avenue and then north to 39th street for the purpose of conveying to his home there a salesman employed by appellant. Foelsch then started to drive to appellant's plant at 57th and LaSalle streets, and testified that he turned south on Parnell avenue at 31st street. As Foelsch was driving south on Parnell avenue between 3rd and 4rd streets, appellant's intestate, who had been playing on the west side of Parnell avenue, started to run across the pavement to the east side, and while so running was struck by appellant's delivery truck and injured. He was assisted to his home at No. 3241 Parnell avenue, where he died about an hour after he was injured. Foelsch testified that he did



not see the deceased upon the street, and did not realize that an accident had occurred until he felt a jar occasioned by one or both of the wheels on the west side of the truck passing over the deceased, and that he brought his truck to a stop within six or eight feet of the point where he saw the deceased getting up from the street. He further testified that he rang a bell continuously as he drove south on Parnell Avenue from 32nd Street; that it was then light; that the lamps on the truck were not lighted and that he was driving at a speed of about 4 or 5 miles an hour. He testified at the coroner's inquest that at the time he felt the jolt or thud he was running somewhere between 3 and 5 miles an hour. While there is a sharp conflict in the evidence as to the rate of speed at which the truck was then running, a preponderance of the evidence tends to show that no bell was rung or any other warning signal given as the truck ran south on Parnell Avenue; that it was then getting dark and that the truck ran a distance of approximately 75 feet after it struck the deceased and before it was stopped. There is also evidence tending to show and the jury were not unwarranted in finding that at the time in question Foelsch was disregarding the law of the road by running the truck south on the east side of Parnell Avenue.

Under the evidence bearing upon the issues of the negligence of Foelsch in driving and operating the truck and due care by appellee's intestate for his own safety, we are not justified in interfering with the verdict of the jury.

It is said by counsel for appellant that there is no evidence in the record that the death of appellee's intestate resulted from the injuries alleged in the declaration, and Johnson v. Chicago City Ry. Co., 166 Ill. App., 48, is cited in support of appellant's insistence that the judgment



must be reversed for failure to make such proof. The Johnson case is not in point. In the case at bar, the identity of appellee's intestate as the person injured was clearly established by the evidence. True, the character and extent of his injuries were not shown, but the evidence discloses, as heretofore stated, that he died at his home within about an hour after he was injured. It appears to have been conceded by appellant upon the trial that appellee's intent to die as a result of the injuries occasioned by appellant's truck. In the course of his cross examination of a witness called by appellee, counsel for appellant referred to appellee's intestate as the little boy who was killed, and upon his direct examination of Adolph Hermann, a deputy-coroner, counsel for appellant asked the witness whether he remembered holding an inquest on March 2, 1911, "upon the body of a boy who was killed by an automobile". Upon this record and from the evidence adduced the inference is irresistible that appellee's intestate died as a result of the injuries complained of in the declaration. In the Johnson case it is said:

"If it be admitted that the person injured was William Pent, and that he died seven hours after the accident at a hospital, the inference would be very strong that his death was occasioned by the injuries received."

It is urged that the trial court erred in not admitting evidence offered by appellant tending to show that at the time of the accident, its driver, Fodsch, was not acting within the scope of his employment, nor in furtherance of his master's business, whereby appellant would be relieved of liability arising from the negligence, if any, of its said servant.

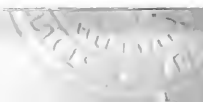
The witness, Fodsch, testified that after completing a delivery at 31st street and Armour Avenue, he took Dr. Sleeth, a salesman employed by appellant, to his (Sleeth's) home, and



then started on his homeward trip to the bakery. He was then asked whether he had obtained appellant's permission to take Mr. Sleeth home, and an objection to the question was sustained. Counsel for appellant then offered to show by the witness "that on the day in question, after having completed the special delivery at 31st Street and Avenue Avenue, and contrary to the instructions and direct of his employer, witness did not return to the plant of his employer, but proceeded upon a personal mission for himself, the mission being to take a friend home, the friend living at a point outside of the established route of the witness". Objection to the proof offered was sustained, presumably, as appears from the record and the statements therein of court and counsel, upon the ground that in the absence of a special plea, the plea of the general issue interposed by appellant admitted appellant's ownership and operation of the truck, and that the servant of appellant, viz., at the time of the accident, engaged in operating the truck in the regular line of his duty and employment.

Notwithstanding the fact that counsel for both parties have argued this question at length, a determination of the question is not necessarily involved upon this record. It is conclusively established by the uncontroverted evidence that at the time of the accident Foelsch was engaged in driving the truck to the plant of appellant, as it was his duty to do in the regular line of his employment, after he had completed his work. If the accident had occurred while he was engaged in taking Sleeth to the latter's home, a different question would be presented.

It is suggested that it was error to admit proof that Foelsch was driving the truck south on the east side of the street and so disregarding the law of the road. The





record does not disclose any objection by appellant to such proof when made, but if timely objection had been made, it would have been of no avail. The allegations of the declaration with respect to the negligent operation of the truck are sufficiently broad to admit such proof in support of a substantive ground of recovery. But if this were not so, such proof would be admissible as bearing upon the question of the contributory negligence of appellee's intestate.

There is no substantial error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.



395 - 18863.

CLARK AUBREY,  
                    ), appellee,

vs.

CHARLES C. O'BYRNE, Executor  
of the Estate of JESSIE S.  
DONLEY, Deceased,  
                    Appellant.

APPEAL FROM

SUPERIOR COURT,  
COOK COUNTY.

188 I.A. 601

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

In an action of assumpsit Clark Aubrey recovered a judgment of \$1,924.04 against Charles C. O'Byrne, executor of the estate of Jessie S. Donley, deceased, appellant. The case was tried upon an agreed state of facts, in substance, that on November 13, 1908, Jessie S. Donley had on deposit to her credit with the Citizens State Bank of Big Rapids, Michigan, the sum of \$1,924.04; that on that day she had been informed that she was about to die and could not recover, and she believed she was about to die; that the plaintiff, Clark Aubrey, was her nephew and her only heir at law, except her husband, William E. Donley; that she did not then know the exact amount of money she had in the said bank and she thereupon, on said date, executed her check in these words:

"No. \_\_\_\_\_ Big Rapids, Mich., Nov. 13, 1908.  
Citizens State Bank, Pay to Clark Aubrey or order \$3,000  
Dollars.  
                    Jessie S. Donley."

She forthwith delivered said check to said Clark Aubrey without any valuable consideration therefor, and by the execution and delivery thereof she intended to assign to Clark Aubrey as a gift all her right, title and interest in said sum of money then on deposit in said bank to her credit; that about the same time she drew said check she also made her will in which no mention was in any way made of



said sum of money deposited in said bank, and said check was made and delivered in contemplation of her impending death; that within three hours after the execution and delivery of said check to said Aubrey she died; that said check was never previous to her death presented to said bank for payment or accepted by it at any time, and after her death it refused at all times to pay said check to said Aubrey; that appellant was on March 29, 1909, appointed executor of the estate of said deceased by the Probate Court of Macosta County, Michigan, which said court had jurisdiction of probate matters in said county and state, and had jurisdiction of the said estate; and that appellant, as such executor, obtained said money from said bank and refused to pay the same to appellee on his demand therefor.

To an appropriate declaration filed by appellee under said facts, appellant plead the general issue and a special plea averring that it was the law of the State of Michigan that a check upon a bank, made and delivered by a donor, intended as a gift cause mortis, to the donee, where such check is not presented to or accepted by the bank in the lifetime of the donor, is no such delivery of the funds of the donor in the bank as to pass title thereto to the donee, and that the delivery of the check as aforesaid did not constitute a valid gift cause mortis of any of said funds of the donor, etc.

No proof whatever was offered in support of the special plea, by the agreed state of facts or otherwise. In the absence of averment and proof to the contrary, it must be presumed that the common law prevails in the State of Michigan, and that the decisions of the courts of Illinois embody a correct exposition of the common law as it prevails in the State of Michigan. Farrier v. Loan Co., 18 Ill. App., 260; Mutual Life Ins. Co. v. Levine, 180 Ill. App., 302, and cases there cited; Crouch v. Hall, 10 Ill., 163.



Under the common law as interpreted by our Supreme Court the drawing of a check upon a banker by a drawer having funds in his bank operates as an assignment and transfer to the drawee of the legal title to so much of the fund on deposit as is named in the check, as between drawer and drawee; that in order to charge the bank with the amount of the check, it is necessary that the check be presented to it for payment, or some other act done equivalent thereto, and that it be shown that the drawer had at the time of presentment sufficient funds on deposit to pay the check. Bank of Antigo v. Union T. Co., 149 Ill., 343; Munn v. Burch, 26 Ill., 21; Cape Hotel Co. v. Union Nat. Bank, 171 Ill., 531.

If in this case the drawer, Jessie S. Donley, had drawn a check on the bank to appellee for the exact sum of her deposit, there could certainly be no question that under the said holdings it would have operated as an assignment and transfer to him of the entire deposit, with the other admitted facts considered that by such check she intended to assign and deliver the deposit to him as a gift causa mortis. The title to the deposit, too, would undoubtedly have been absolute in Aubrey and irrevocable by the executor after the death of the donor from the peril that induced the gift without revoking the gift. The delivery of the \$1,000 check by said donor with the intent to transfer and deliver the deposit and no more, and as a delivery of that deposit whatever it might be and so mutually understood by drawer and drawee, should when considered with the other facts in the case be treated as a good and completed gift causa mortis. The delivery of the gift was a symbolical delivery, and just as complete and effective as if the donor had delivered to appellee her pass book with direction to the bank to pay all her deposit to him. It was accepted by appellee and the gift, though revocable by her





at any time before her death, was never revoked by Mrs. Donley. After the delivery of a gift causa mortis to the donee by a donor, and after death of the donor without revoking the gift, the legal representatives and heirs have no power or authority to revoke the gift.

Appellee could not maintain an action on the check in question against the bank on which it was drawn, because it was in excess of the drawer's deposit. Cootes v. Preston, 105 Ill., 470.

The question, however, of whether or not appellee in his own name could recover against the bank, or whether or not the bank was liable on the check to appellee, does not determine the question of the liability of appellant to appellee. Appellant, as executor, took into his possession money rightfully belonging to appellee and the law implies a promise on his part to pay it to appellee. McDonald v. Brown, 16 Ill., 38; Varley v. Sims, 8 L. R. A. (N. S.), 819.

The courts in this country generally hold that a gift of a deposit book of a savings bank is a gift of the fund, and that such a gift may be valid as a gift causa mortis. Thornton on Gifts and Advancements (1893), Sec. 330, 331 and 334; 14 Am. and Eng. Ency. of Law (2d Ed.), 1602.

The gift in such cases is upheld upon the theory that the delivery of the bank-book with intent to deliver the deposit is a good symbolical delivery of the deposit, sufficient to satisfy the demands of the law of gifts causa mortis with respect to delivery thereof.

Section 188 of our Negotiable Instrument Act, Hurd's Stat. 1911, p. 1609, is not applicable to this case, even if it should be held to change the common law rule that a check for the full amount, as between the drawer and payee, is an assignment of the bank fund.



October Term, 1912. No.

417 - 18884.

188 I.A. 603

WILLIAM JUDGE,

Appellee,

SPECIAL FROM

vs.

THE CITY OF ST. LOUIS,

SOUTH HALSTED STREET IRON

WORKS, a Corporation,

Plaintiff.

Appellant.

MR. JUSTICE SWANSON DELIVERED THE OPINION OF THE COURT.

This appeal is by South Halsted Street Iron Works to reverse a judgment of \$2,000 against it in a personal injury suit brought by William Judge.

There is no controversy about the facts of this case as appellee and his friends, John Brown, and every other man in the case, testified to satisfactorily to the state of facts. Their evidence is fully supported by the evidence of the declaration, and is, in substance, that appellee, a structural iron worker of twenty years experience, had obtained the employment of appellant about six weeks prior to his injury on a school building under construction at 10th and State streets, St. Louis, by appellant, who was then in charge of certain structural iron, steel and carpentry work. Appellee was then to be employed by appellant as a structural iron worker and was actually called by appellant to this building to assist in the erection of the structural iron work. He was then seen delivered to the building. The iron work was then on the cars and generally by, because of the nature of the work to try the joint and to put it on it. The iron work then was coming to the building and was then prior to appellee's injury on coming off the building by means of the iron work is only about from the building to the ground. On Friday or Saturday before the injury, on November 7, 1910, the iron work was then on the building.



the iron continued to come wet and slippery with paint, as it was dangerous to handle it in that condition, and he then told Mr. Berg, appellant's foreman at the building, that he was going to quit the job, unless the iron thereafter was dry when delivered for unloading. Mr. Berg replied: "Well, we will see. I will telephone and see that we get it remedied, so that we do not get any more stuff like that." Upon this promise being made appellee continued at his employment, and received his injury while unloading the very next load he undertook to unload after that promise was made to him. Appellee and Mr. Stream were directed by the same foreman, Mr. Berg, to unload the wagon in question. They accordingly went to the wagon and first removed a loose chain from around it, and looked at the iron or steel and touched it with their hands to see if it was dry and safe, and remarked to each other that it was dry and looked good. They then removed from the top of the load the small T-iron the paint on which was dry. The load of steel extended above the short stakes or standards on the bolsters of the wagon and above the wheels. Mr. Stream was looking for a bar to pinch off the heavy pieces while appellee got on top of some smaller irons piled on an elevated place by the side of the wagon to straighten them out so the heavy iron could be unloaded on top of them without bending any of the iron. While appellee was thus at work about four feet from the wagon and about opposite the hind wheels there was suddenly a slight jar or move of the wagon and at the same instant a large lintel about eighteen inches wide on its base and from fourteen to sixteen feet long "shot out from the load", and almost cut off one of his feet. Mr. Stream gave appellee warning just as the lintel started, but the warning was too late. The lintel in question was slightly tilted out of a horizontal position, and its broad face or bottom was faced up close against the face or bottom of a similar lintel. The

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paint on the outside of those two lintels looked to be dry but their two faces that were touching each other were wet and slippery, because the paint had not been dried before they were loaded. The witnesses described them as "slippery as soap", and attributed the sliding of the lintel the distance it was thrown to that slippery condition, which overcame the friction that would otherwise have held them together. They were not able to say whether it was a move of the team or the movement of the lintel as it went out of the wagon that caused the sudden move or jar of the wagon.

It is first contended by appellant that appellee assumed the risk in this case, and that appellant's promise to remove the danger on appellee's complaint did not suspend the doctrine of assumed risk, because appellee was engaged in simple labor with simple appliances, and that the "simple tool rule" should be applied. The simple tool or simple appliance rule has no application to this case. The evidence showed that it was the custom of the trade for structural iron to be delivered in a dry condition before being unloaded and that the slippery and dangerous condition of the iron in question was not a usual and customary condition met with by those who unloaded it. The danger that caused appellee's injury was in the nature of a latent defect or danger. It was an extraordinary peril of the business in which appellee was engaged and arose from the alleged negligence of appellant, and appellee could not be held to assume it in the absence of a knowledge of the danger. Extra hazards which result from the master's failure to perform his duties to employees do not come within the risks which the latter assume as a part of their contract of service, until the employees obtain knowledge of the extra hazards to which they are exposed. U. S. Rolling Stock Co. v. Wilder, 116 Ill., 100; The Chic. H. and B. Co. v. Mueller, 203 Ill., 556.

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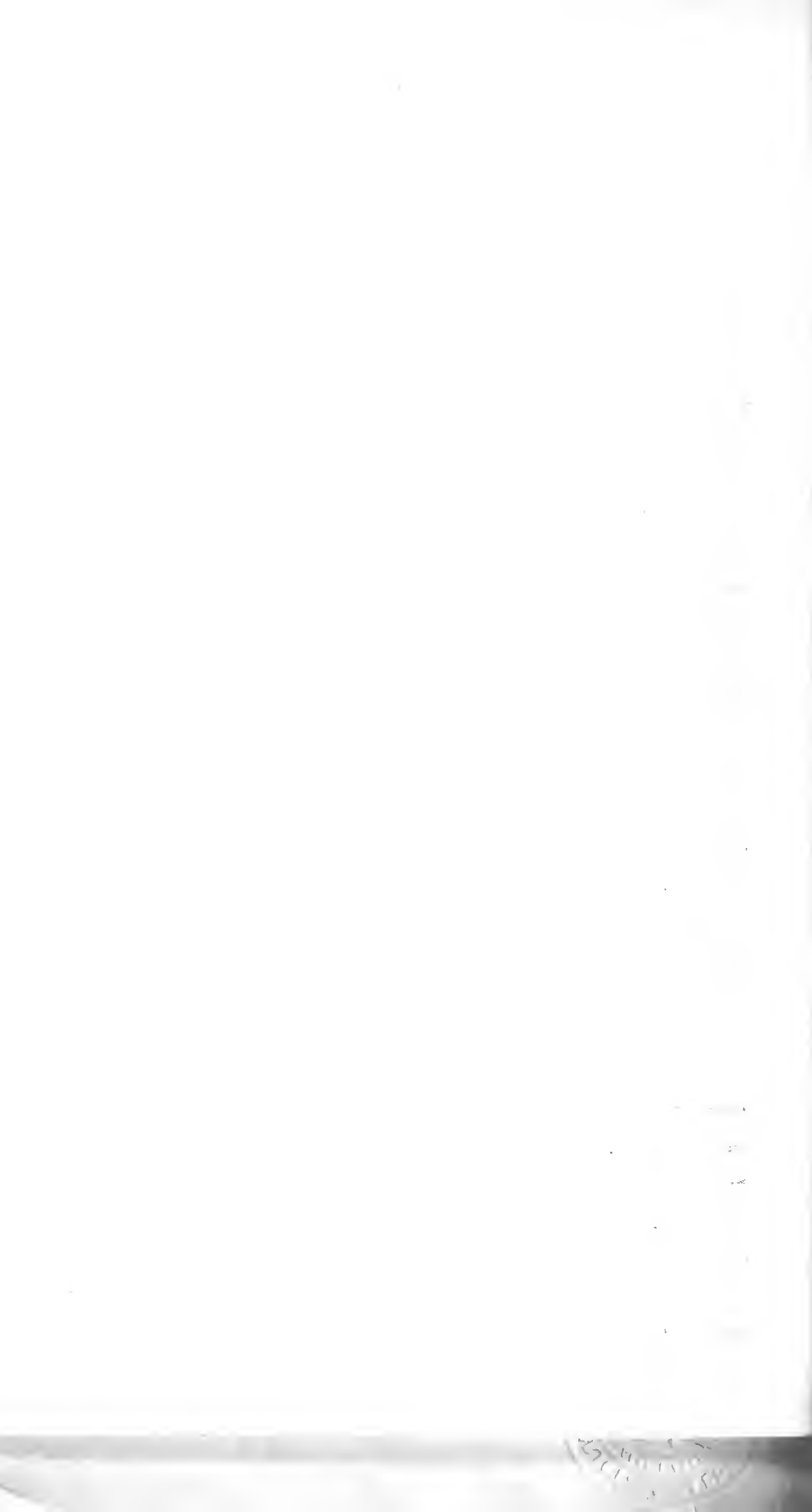


Appellee prior to his injury became aware of the dangerous condition in which the iron was being delivered for unloading, and had he continued in the employment with such knowledge and without complaint the danger would have continued as an assumed risk to him. He, however, gave notice of the danger and of his intention to quit the job unless the danger was removed, and received the promise of the foreman that the danger would be removed. The evidence shows clearly that appellee relied on the promise and, therefore, continued in appellant's employment. The effect of that promise to remove the danger, that is, to have the iron delivered in a dry condition, was to relieve appellee from the assumption of that risk for a reasonable time thereafter, unless the danger was so imminent that no prudent person would encounter it. Morden Frog Works v. Fries, 228 Ill., 246.

Appellee was induced to rely on that promise, and the evidence shows further that he did rely on it and that he thought appellant had complied with its promise. The condition of the iron already unloaded and the appearance of all the outside or exposed parts of the load in question indicated that the promise had been complied with, and he had no notice or knowledge to the contrary. The evidence, therefore, entirely negatives the existence of any knowledge of the danger by appellee that caused his injury.

It is also urged by appellant that there is no evidence that the horses and wagon or the iron in question belonged to appellant, or that the driver was the servant of appellant. The horses and wagon were not the appliances of which complaint was made, and the driver was not even at the place or with his team and wagon when the injury occurred.

Appellant only filed the general issue to appellee's declaration and, therefore, the ownership of the instrumentalities complained of was admitted by the pleadings as the



declaration charges such ownership and control of the same.

Chic. U. T. Co. v. Jerka, 227 Ill., 95.

The question of whether or not appellee was guilty of contributory negligence was submitted to the jury, and the verdict is well supported by the evidence. Appellant was also chargeable with notice of the wet and slippery condition of the iron by reason of the green paint thereon, although the foreman himself did not have actual knowledge of the condition of this load in question. Appellant had been given notice of the conditions of the loads complained of, had promised to see that no more iron should be delivered in that condition, and its loaders' knowledge, whoever they were, was knowledge or notice to appellant, and it was its duty to see that the iron was delivered in reasonably safe condition for unloading, as it had promised to do.

The jury were also justified in finding that the slippery condition of the iron was the proximate cause of appellee's injury. The evidence tends to show that the slippery condition of the iron overcame the friction of the two lintels that lay surface to surface, and that the friction would have held them together had they been dry, and that the one that slid off the wagon against appellee would not have been thrown so far and against appellee, if it had not been for the wet paint. It is argued that it was the moving or jar of the wagon that caused the lintel to suddenly shoot out of the wagon. It is not clear by the evidence that the wagon was moved or jarred otherwise than by the movement of the lintel itself. But the evidence does tend to show that the slippery condition of the lintel was an efficient cause of appellee's injury and that it would not have occurred but for such slippery condition. If an inanimate thing contributed with the negligence of appellant and appellant's negligence



was an efficient cause of the injury appellant is liable.

Pullman P. C. Co. v. Laack, 143 Ill., 242.

Complaint is made of appellee's first instruction, because it directed the jury to find a verdict without taking into consideration the defense of assumed risk. The instruction might have been more satisfactorily drawn had it been based on the second count of the declaration which charged a complaint by appellee of the dangerous conditions in which the iron had been previously delivered, and a promise by appellant to remove that danger from future loads to be delivered. We do not think, however, that there is any reversible error in the instruction for the reasons assigned. In the first place, the evidence shows clearly that appellee had no knowledge of the dangerous condition of the load in question. He had examined it and found it was apparently a dry load, as he had been promised it should be, and there was no reason for him to believe otherwise. He could not know the condition of the two wet surfaces of the lintels until they were separated. The question of assumed risk was, therefore, not involved in the case, and it was not reversible error for the instruction, if otherwise correct, to direct a verdict without reference to the defense of assumed risk. Knox v. Am. R. E. Corp., 236 Ill., 437, affirming 140 Ill. App., 359.

In the next place, there is no dispute about the facts that appellee complained of the danger and had made up his mind to quit unless the danger was removed; that appellant promised to remove the danger and that appellee relied thereon and continued in the employment of appellant and believed at the very time of his injury that appellant had complied with its promise, and that the load was a dry load. By that promise appellant impliedly agreed that appellee should not be held to assume the risk for a reasonable time after such promise, which



reasonable time could upon no grounds be said to have expired.  
Swift & Co. v. O'Neill, 187 Ill., 337.

The instruction is not subject to appellant's other objection that it gives a wrong definition of proximate cause. The instruction in effect told the jury that, although some other agency was a contributing cause of the injury, yet if they believed that the slippery condition of the iron by reason of the green paint was also a proximate cause of appellee's injury, his recovery could not be legally defeated, because of the other concurring and contributing cause. Appellant overlooks the fact that the law recognizes that there may be two proximate causes of an injury which would not have occurred but for the joint existence of both of said causes, and in such a case both causes combined constitute the proximate cause of the injury. In such a case, if a defendant's negligence is one of such proximate causes, he is responsible for the injury. City of Joliet v. Shufeldt, 144 Ill., 403; Ford v. Hine Bros. Co., 237 Ill., 463.

There was no reversible error in the admission of evidence, as claimed by appellant, and the other errors assigned by it are waived because not argued. The judgment of the court, is, therefore, affirmed.

AFFIRMED.





October Term, 1930

454 - 18925.

E. J. HOLSLAG, doing business as  
HOLSLAG & COMPANY,  
Appellee,  
vs.  
ROBERT H. MORSE,  
Appellant.)

188 I.A. 607

APPEAL FROM

MUNICIPAL COURT  
OF CHICAGO.

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by Robert H. Morse from appellee's judgment of \$1,475.75 for a balance due under a contract for alterations and interior decorations in appellant's home.

The declaration is the usual form with the common counts only, accompanied by an affidavit avowing that the claim was for a balance due of \$1,475.75 on a final settlement made by appellee and appellant for work, labor and material furnished by appellee to appellant under a contract in writing, a copy of which was attached to the declaration. Other items in the account were added, but they are eliminated from further consideration on this appeal, because they have been abandoned by appellee and were not allowed by the court. The trial was before the court without a jury.

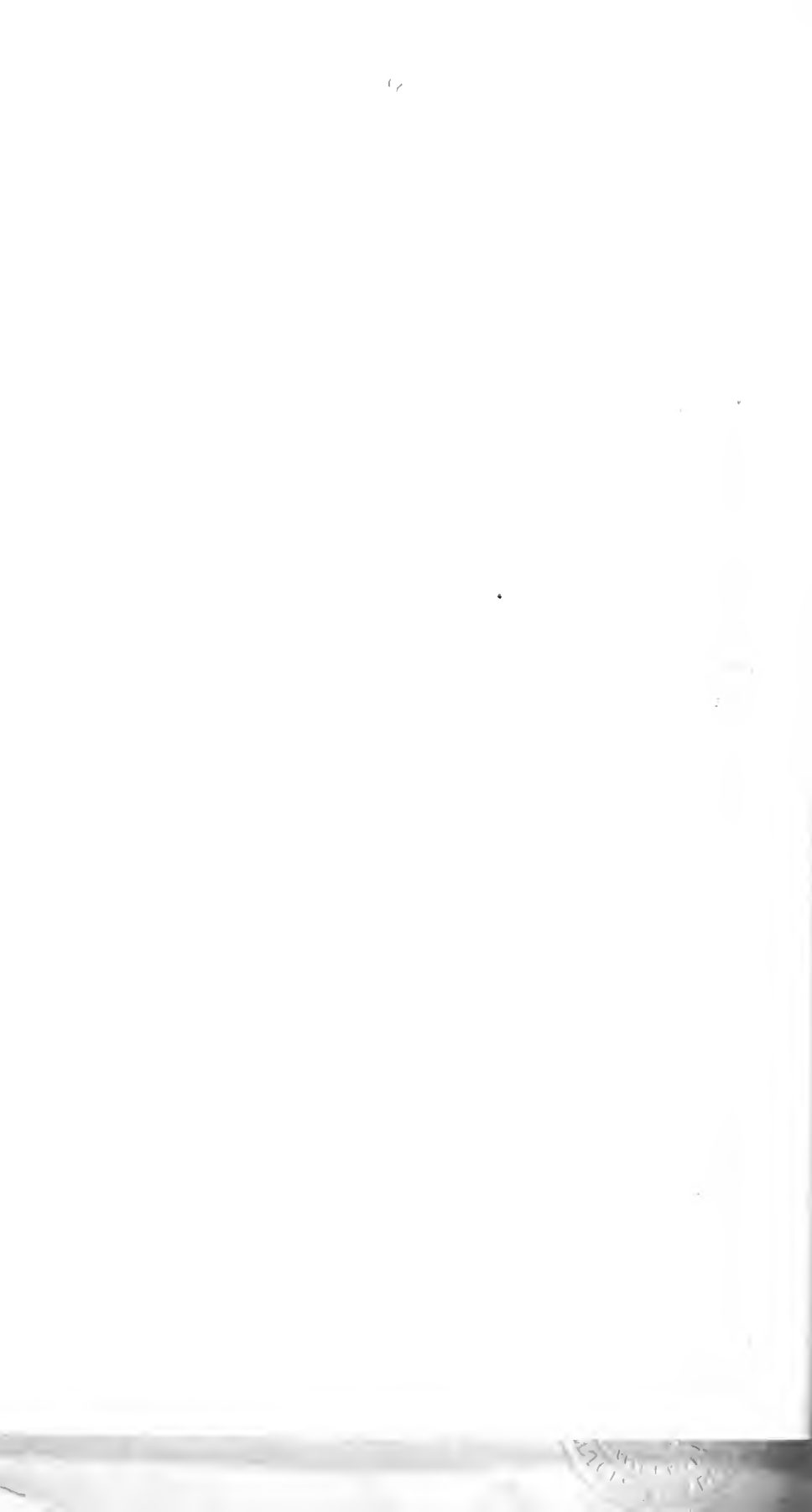
After reading an abstract of about 300 pages of a record of over 1,400 pages, supplemented by briefs and arguments of more than 200 pages, we are able to state that the material facts applicable to appellee's claim, and about which there is practically no dispute, are, that on December 14, 1908, appellee and appellant entered into a written contract whereby appellee agreed to provide all the materials and perform all the work for the completion of all interior cabinet work, and stone and mantel work in the music room, and all interior decorations and plain painting and art glass and lighting fixtures in the additions and alterations to the residence of



appellant for the contract price of \$6,700. The work was completed by appellee in the latter part of July or August, 1909, and controversies then arose as to the amount to be paid therefor to appellee. Appellee claimed a balance due him of about \$2,800 on the contract, having already been paid about \$4,500, and claimed for extra work a further sum of \$1,830. There were outstanding bills estimated at \$1,475.72 due to sub-contractors. Appellant claimed that some of the charges for extras were covered by the original contract and that others of them were overcharges. On September 24, 1909, those controversies were settled by appellee and appellant by an agreement between them by which appellant was to pay appellee the sum of \$2,576 on receipt from appellee of waivers of liens by the sub-contractors, and appellee's waiver of lien for all work, and a sworn statement to the effect that all bills for labor and material had been paid by him. The sub-contractors and the amounts due them, whose waivers of lien were to be thus obtained, were specifically mentioned and stipulated to be as follows:

|                                 |           |
|---------------------------------|-----------|
| Saunders Mfg. Co.....           | \$356.00  |
| Chicago Ornamental Iron Co..... | 120.00    |
| Wilmarth Co.....                | 347.32    |
| Union Interior Co.....          | 125.00    |
| Coe & Lockett.....              | 276.00    |
| Codenhead & Morrow.....         | 50.00     |
| Total.....                      | \$1475.72 |

Appellant drew his personal check on his bank payable to appellee in the sum of \$2,576, and placed it in escrow in the hands of one Robert G. Owen to be delivered to appellee when he should deliver to appellant said waivers of liens and affidavit. Appellee was not able to secure the waivers from said sub-contractors because they claimed liens on the building for other claims due them from appellant, and appellee so reported to appellant. On September 25, 1909, in appellant's office appellee said to appellant, "Why isn't it just as well



if I give you the checks payable to those people and you give me the difference or balance that is coming to me." Appellant replied, "Well, that will be all right." Appellee then and there made out, signed and delivered to appellant checks payable to said several sub-contractors in the several amounts aforesaid amounting to \$1,475.72, and also delivered to him his own waiver of lien and the affidavit aforesaid. Appellant then said to him, "How much do I owe you?" Appellee then figured by deducting the sum of all of his said checks from the \$3,576 appellant was to pay him, and replied that appellant owed him \$1,100.28. Appellant then said, "Are you sure you are not cheating yourself?" To that appellee replied, "I guess I know how to figure even if I don't sit in a big office." Appellant then drew his personal check to appellee for "\$1,100.28 in full", signed it and delivered it to appellee. Appellee discovered his mistake a few days later and asked appellant to rectify it and pay him the balance of the \$3,576 that appellant had agreed to pay him, or \$1,475.72, but appellant refused, and made a claim to appellee that the work on his house was not done according to contract and that the circassian veneering on the wall of his music room had checked and split, and claimed damages therefor under the contract which guaranteed the work not to check or split within three years.

Appellee was clearly laboring under a mistaken idea when he accepted appellant's check in full of the amount due him, and, as appellant expressed it, cheated himself out of \$1,475.72, which he not then on appellee until his said outstanding checks began to be presented to him for payment. It also clearly appears that appellant at the time he delivered appellee the check in full of all of appellee's claim knew appellee was in error and to put it in his own way knowingly allowed appellee to cheat himself. Appellee took note for his error, testifying that he had been away shortly before on press-



ing business matters that were worrying him, and that he was laboring under some excitement owing to the long worry with appellant in getting the matters between them settled. He do not think it is very material as to what caused the mistake. The amount owed to appellee by appellant by their final agreement was stated to be \$2,576 on appellee's paying a sub-contractors the said accounts due them, which would leave appellee net over and above the same due the sub-contractors \$1,100.88, the amount stated in the check of appellant.

After said final agreement was reached by the parties appellee's claim could not be longer regarded as an undisputed claim, and an acceptance of a less sum due him by the agreement in satisfaction thereof by mistake or oversight, which was well known to appellant, would not discharge the debt or claim in full. An acceptance by a creditor of a sum of money less than the amount due, even if done by agreement without further consideration, is a discharge of only so much of the debt as is thereby paid. The rule is otherwise where property other than money, or money and property, are taken in full satisfaction, or where the payment is the amount agreed upon in an honest compromise of undisputed or disputed demands. Titworth v. Eyle, 54 Ill., 286; Seal v. Hargray, 116 Ill., 418; Hyes v. Mass. Mut. L. Ins. Co., 175 Ill., 526; Bingham v. Branning, 197 Ill., 128.

It is not essential to the creditor's right of action that he rescind the contract of settlement or that he return the money or check received, but only that he give the debtor credit for the amount paid, where the creditor takes a less sum than the amount due in full satisfaction of a liquidated and undisputed debt. Farra v. M. L. Apple v. Case, 4 Ill., 598; Reed v. Engel, 237 Ill., 678.

Appellant's claim that appellee did not redress on the second account because the architect's final certificate was

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not produced is untenable under the facts proved. Appellant asked the architect not to make such certificate and undertook to, and did, make a settlement of all disputes with appellee as to his claim. Where the owner asks the architect not to make such certificate, and makes payments and settles with the contractor without such certificate, the provisions of the contract requiring certificates are waived. Mason v. Chaerik, 109 Ill. App., 509; Wt. St. L. E. Church v. Brown, 104 Ill., 106.

Where a building contract has been fully performed and the final account due agreed upon and it only remains to pay the balance due, the contractor may recover under the common counts, and the contract may be read in evidence for the purpose of showing its terms. Concord A. H. Co. v. O'Brien, 111 Ill., 350; Adlard v. Bullock, 40 Ill., 193.

Substantial performance of a building contract is all that is required to enable the contractor to maintain a suit for the contract price. The owner is not in a position to deny substantial performance and rejects the work and has agreed upon a final settlement and payment therefor. Lyons v. Howell, 111 Ill., 56; Concord A. H. Co. v. O'Brien, supra.

Appellant says in his brief, "There is no doubt that appellee made a mistake when the settlement was concluded on September 25, 1908." He also says that he does not see how that he shall be given just compensation in his claim for set-off, "and also be allowed to retain that which he received through the gross carelessness of the plaintiff on September 25th." This is a virtual admission of appellee's claim; and, yet, about one-half of his brief of one hundred and fifty-one pages is vigorously employed in an attempt to show that there was no final settlement of appellee's claim, that it still remains an undisputed and disputed claim, and that appellee's receipt and retention of the check "in full" constituted no accord and satisfaction, and is an absolute bar to this suit.



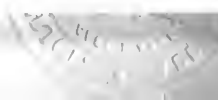
Our conclusion is that he is right in his judgment that appellee's claim is a just one,, but in error in concluding that it was not a legal and binding obligation against him.

Appellant's plea was the general issue with notice of special matters of defense, payment, accord and satisfaction, release and breach of contract.

The specifications of the contract provided that the wood work in the music room should consist of wood veneer extending eight feet and a half high and of the best quality of selected circumcadian walnut veneered on pine core, and all veneer work to be guaranteed for a period of three years "not to crack or show any defects whatever", "the entire wood work to be what is known as cabinet work of the highest grade."

The total veneered surface in that room is nearly 800 square feet, and the work was done by sub-contractor, F. C. Bauman Mfg. Co., for the contract price of \$1,690.50. The evidence of appellant tended to prove that in December, 1909, checks and cracks began to appear in the veneer, and that in January, 1910, those defects appeared in almost every sheet of veneer in the room in what is called the heart or center formed by the cross grain of the wood at the points where branches came out from the trunk of the tree, or in what is known as the "crotch of the tree"; that in some places the veneer came loose from the core to which it was glued, making a bulged or blistered appearance. On complaint of appellant to appellee, Bauman & Co. attempted to repair the defects, and the evidence shows that in three places the veneer was nailed, and that there were left visible nail heads and nail holes, and that the places repaired appeared to be polished and brighter than the balance of the finish.

Appellee's evidence merely tended to minimize the cracking and checking of the veneering, or rather to show that appellant had exaggerated those defects. Appellee also



makes the claim that he is not responsible for the defects, because appellant and the architect selected veneering that would crack anyway, and that the architect ordered the sub-contractor to put on the veneering when the room was very damp and that the sub-contractor told the architect it would crack if put on while the room was damp and told him that he would not be responsible if it did crack and crack.

Appellant's evidence also showed clearly without being contradicted that gessoed, a rather cheap wood, was used for the floor moulding, and that some of the crown moulding was also gum wood, instead of crotchwood which was specified for, and that a chestnut core was used in the veneer instead of a pine core, the contractor's trial; that in some of the panels there were a number of nail plugs; some of different kinds of veneer, which had a bad appearance in the veneering; and that the panels and mouldings were joined in the corners with miter joints instead of tongue and groove which was necessary in high grade work called for by the contract. Appellee's evidence, however, was to the effect that the panels and mouldings were tongue and groove in the corners.

We do not intend to discuss the merits of the evidence further than to say that we think it is very clear that the contract was violated in all the particulars above, i. e., that the work as executed was not of the high grade of work that the contract called for, and that the materials called for in the particulars above mentioned were not furnished, and that the warranty or guaranty was broken. To have explained the contract carefully we find nowhere in it any power or authority given the architect to waive any provision in it in its requirements as to the work or the materials specified. There are a few articles or materials that are not specifically defined but were to be selected by the architect, but there is no such provision as to the material and work specified or by



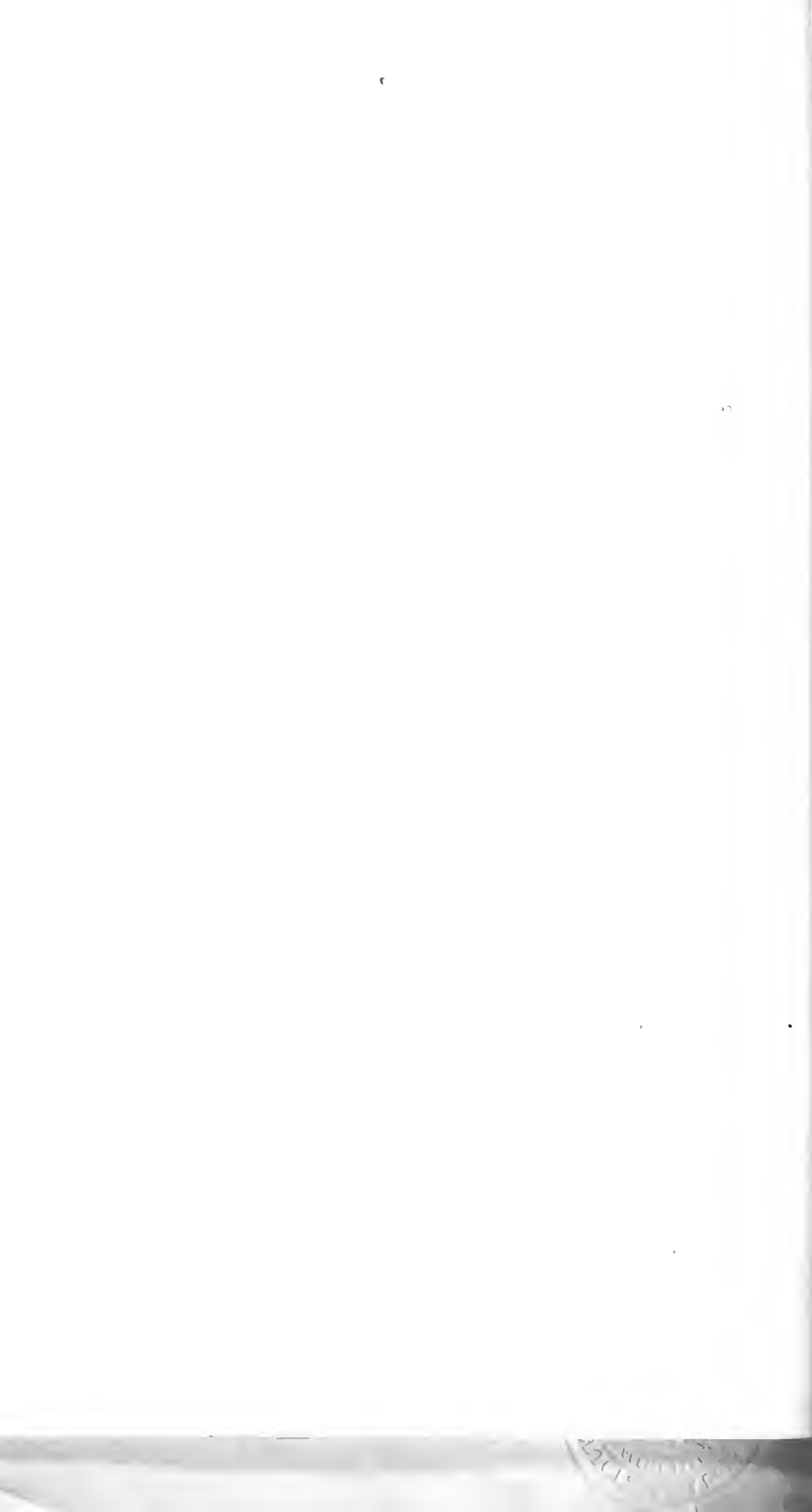
appellant. The contract specifically provided that no certificate of the architect, except the final certificate, shall be conclusive evidence of the performance of the contract, either wholly or in part, and that no payment shall be retained to be in acceptance of defective work or improper materials. There was no final certificate issued by the architect for the work in question. The specifications conclude with this provision:

"That the contractor will furnish all the labor and materials to perform all the work as shown on the elevations and designs submitted and in accordance with the specifications attached hereto and made a part of this agreement according to their true intent and meaning, and to the satisfaction of owner and the architect. Latent work in this contract to be guaranteed for a period of one year, resulting from improper workmanship or defective materials."

The said settlement of the parties was only as to appellee's claim for amount due then on contract and for extras, and did not affect the right of appellant to recover for the breach of the contract and of the guarantee.

Appellant's claim is for unliquidated damages and hence is not properly a matter of set-off, strictly speaking, but may be recovered, i. e., he could mitigate or lessen appellee's claim, or entirely reject it, if his evidence was sufficient, but he could recover no judgment for any excess in his favor. Appellant's claim grows out of the same contract or subject matter out of which appellee's claim grew, and his acceptance of the building and paying for the work and materials could not prevent appellant from recovering his damages, unless he accepted the house in full discharge of the contract or otherwise waived his right to recover. Fatep v. Fenton, 66 Ill., 457; Belord v. Sullivan, 43 Ill., 193; Felt v. Smith, 62 Ill. App., 637; Underwood v. Self, 141 Ill., 436.

Latent defects in work under a building contract, not open to inspection are not waived by the acceptance of the





work in ignorance of their existence. Contractors are bound to know of defects in their work, and of the failure of such work to comply with the contract, whether done by themselves or their sub-contractors. Monahan v. Fitzgerald, 164 Ill., 525.

The law gives to the owner in a building contract, as well as to the contractor, the full benefit of his contract, and the architect who is to merely superintend the work and pass on the quality and fitness of the materials as required by the contract has no power or right to waive for the owner his right to insist on the character of the work and materials called for in the contract. Such authority must be given by the contract or by the assent of the owner, before it can be said to exist.

In this contract in question the owner or the owner and the architect may waive any of its provisions, but the architect alone can not waive the provisions thereof as to the defects aforesaid. If it could be said to be the owner's fault that the veneer cracked and checked, that is, that he insisted on its being put up in cold damp weather with full notice that that would crack and check it, that would be a different proposition. His evidence is that he knew nothing of the fact that gum sealer had been used until after he settled for the work, and this is not seriously contradicted by any one. While he assisted in selecting the veneering, there seemed to be no objection to it by the contractor or sub-contractor, and hence there was no waiver of the guaranty clause.

All such questions on waiver are properly a matter of evidence to be again considered by court or jury on another trial. The court erred in not allowing appellant to recoup his damages, but it is not a matter for us to give judgment for here. Both parties are entitled to a trial on these issues.

As these matters were offered under the general issue with notice, appellee was not required to file any further



findings whatever than the similitude to the general issue.  
Burgess v. Babcock, 11 Ill., 23; Bailey v. Vail v. H. Bark,  
127 Ill., 352.

The record also shows that appellee's counsel asked appellant to permit appellee, or an expert to examine the wood work, with a view to meeting by rebuttal evidence the evidence of appellant's damages to the veneering. This request was refused in the face of appellee's claim that appellant's damages were exaggerated, and that the photographs introduced by him were faked, and in the face of proof that such photographs could be taken so as to greatly exaggerate the cracks and checks. Appellee was thus put to great disadvantage in showing up the real truth of the very matters in issue. Appellant had the right to refuse to grant the permission and the court had no power to compel him to thus open up his residence. Such refusal, however, should in our judgment be considered by court or jury as a circumstance or act clearing him of all suspicion.

That the Supreme Court of Pennsylvania is in sustaining the lower court for finding evidence of such a kind in a similar case heard by a jury, meets our approval. "To smother evidence is not much better than to fabricate it. A party who shuts the door upon a fair examination, and thus prevents the jury from learning a material fact, must take the consequence of any honest indignation which his conduct may excite. The presumption, in odium apolia legis, is perfectly legitimate. It is so natural and so just that it is a part of every civilized code." Bryant v. Stillsell, 24 Pa. St., 314.

We shall not undertake to consider in detail the fifty-one so-called propositions of law passed on by the court.

The judgment of the court is reversed and the cause remanded.

REVERSED AND REMANDED.













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